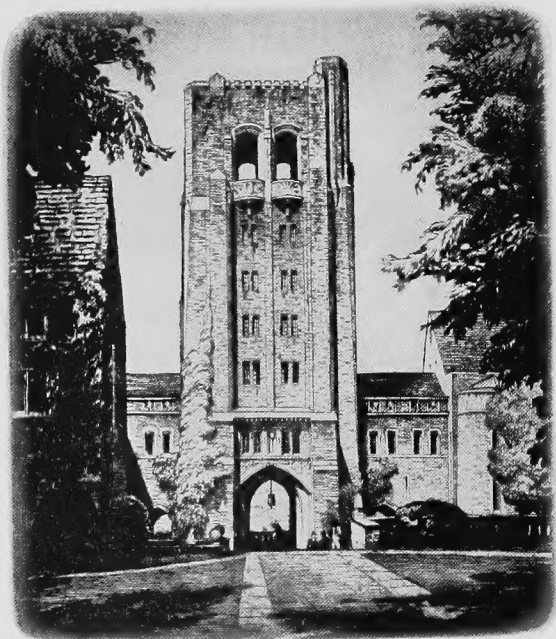




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A SELECTION
OF
LEADING CASES IN EQUITY,
With Notes.

BY
FREDERICK THOMAS WHITE
AND
OWEN DAVIES TUDOR,
OF THE MIDDLE TEMPLE, ESQRS., BARRISTERS-AT-LAW.

With Annotations,
CONTAINING REFERENCES TO AMERICAN CASES,
BY J. I. CLARK HARE AND H. B. WALLACE.

WITH ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS,
BY J. I. CLARK HARE.

Third American, from the Second London Edition.

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TO THE SECOND LONDON EDITION.

IN preparing this Edition, about two hundred and sixty-seven pages of new matter have been added to the Notes. A very large addition has also been made to the cases cited, which are brought down to the latest period.

LINCOLN'S INN,

January, 1858.

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TO THE THIRD AMERICAN EDITION.

A LARGE amount of matter has also been added to the American notes and references ; while an effort has been made by greater economy of space in printing, to prevent the volumes from being too large for convenience.

The additions by Mr. Hare to the notes of Mr. Wallace, in the first volume, are for the greater part marked by brackets.

PHILADELPHIA,

June, 1859.

PREFACE TO THE FIRST EDITION OF VOL. I.

THE plan of this work was suggested by the very able volumes of the late Mr. John William Smith, which contain a selection of Leading Cases principally taken from the Common Law Reports; and it was thought that it might be useful to the profession to have, within a small compass, a selection of Leading Cases decided in Courts of Equity.

Each of the cases chosen will, it is believed, be found either to be frequently referred to in practice, or to enunciate clearly, for the first time, some important principle of equity.

A chronological arrangement of the cases has not been observed, because it has been in the present, and may be in a subsequent volume, found useful to print together cases on the same subject, decided at different periods.

The notes, or abstracts prefixed to the cases, have occasionally, when inaccurate or defective, been altered; and, in some instances, the arguments and judgment in the same case are taken from different reports. Thus, in the well-known case of *Fox v. Mackreth*, the arguments are taken from Brown's Chancery Cases, and the judgment from Cox's Reports; and in the celebrated case of *Garth v. Cotton*, (a complete report of which is not to be found elsewhere,) the arguments are taken from two different places in Vesey Senior's Reports, the judgment from Dicken's Reports, and the decree from Atkyn's Reports.

In the notes, an attempt has been made to develop the principles laid down

or acted upon in the cases, and to collect the recent authorities; but as the nature of the work would not permit that the notes should be complete essays upon the different subjects treated of, they have been principally confined to the points decided in the cases, to which, in fact, they are only intended to be subsidiary.

It will be seen, that, in the notes, some cases of importance are stated at considerable length, and that when it was convenient or practicable, the very words of the Judges have been preserved.

Of imperfections and deficiencies in the notes, the Editors are by no means unconscious, but they venture to hope that the cases (the selection of which, from the great mass of the Equity Reports, was a matter of no small difficulty) will prove useful both to students and to those in actual practice.

JULY, 1849.

P R E F A C E

TO THE AMERICAN EDITION.

IN the American notes to this work, the range of discussion marked out by the English annotations, has usually been followed, as far as was practicable. In some instances, it will, perhaps, be found, that the field of investigation is more extensive than in the original work. It is narrower, in those cases, only, in which illustrations were not supplied by the American reports.

It will be seen, upon the whole, that the jurisprudence of this country has developed an equity system, scarcely less comprehensive, or less complete, than that which has been established in England : and it is a conclusive testimony to the wisdom and practicable usefulness of the English Chancery, that, at the suggestions of experience, its scheme has been adopted, substantially, throughout a country, not influenced by considerations of authority, but proceeding, freely, in quest of essential justice, and under the guidance of a reason proud of its independence.

The doctrine of *Subrogation*, in the learning of Principal and Surety, may be referred to, as an example, in which, among us, a more expanded and consistent application has been given to a settled and valuable principle of equity, and in which the sense of American Judges seems to have gained an advantage, even, over England's greatest Chancellor. Our rule, as to a feme covert's power over her separate estate, is more reasonable and satisfactory, than that prevailing in England ; where, the provision against anticipation admits, without fully controlling, the danger of the original principle. A few titles—

such as *Vendor's Lien*, *Equitable Mortgages*, *the Tacking of Incumbrances*, and a *Purchaser's duty to see to the application of purchase-money*,—have not been received with much favor here, chiefly in consequence of the policy connected with our registration laws. There are some other subjects—such, for example as the *Purchase of reversionary and expectant interests*, illustrated in the great case of *Chesterfield v. Janssen*—which, perhaps, from the rarity of settlements giving rise to such interests, have not often come before our courts for adjudication, though the principles belonging to them, are perfectly well established in this country.

The American notes to the present volume are by H. B. WALLACE. Should a subsequent volume appear, the editorial superintendence of it will devolve upon Mr. HARE.

PHILADELPHIA,

August, 1849.

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LEADING CASES IN EQUITY.

EXECUTORY TRUST.

LORD GLENORCHY *v.* BOSVILLE.

DE TERM. S. MICH. 1733.

REPORTED CAS. TEMP. TALBOT, 3.

EXECUTED AND EXECUTORY TRUSTS.]—*A. devises real estate to his sister B., and C., and their heirs and assigns, upon trust, until his grand-daughter D. should marry or die, to receive the profits, and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies; and after payment thereof, in trust for the said D.; and upon further trust, that, if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or, if under that age, such marriage be with the consent of the said B., then to convey the said estate, with all convenient speed after such marriage, to the use of the said D. for life, without impeachment of waste, voluntary waste in houses excepted; remainder to her husband for life; remainder to the issue of her body; with remainders over:—Held, that though D. would have taken an estate tail had it been the case of an immediate devise, yet that the trust being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to D. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.*

SIR THOMAS PERSHALL devises all his real estate to his sister, Anne Pershall, and Robert Bosville, and their *heirs and assigns, upon trust, till [*2] his grand-daughter, Arabella Pershall, marry or die, to receive the rents and profits thereof, and out of it to pay her 100*l.* a year for her maintenance; and, as to the residue, to pay his debts and legacies; and, after the payment thereof, then in trust for his said grand-daughter; and, upon further trust, that if she lived to marry a Protestant of the Church of England, and at the time of such marriage be of the age of twenty-one or upwards, or if under the age of twenty-one, and such marriage be with the consent of her aunt the said

Anne Pershall, *then to convey the said estate with all convenient speed after such marriage, to the use of the said Arabella for her life, without impeachment of waste, voluntary waste in houses excepted*; remainder, after her death, to her husband for life; *remainder to the issue of her body*; with several remainders over; and, upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life; remainder to the son of his other grand-daughter, Frances Ireland, in tail; remainder to Mr. Bosville, the defendant, for life; remainder to his first and other sons; remainder to the testator's right heirs; and, upon further trust, if his grand-daughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees; as to one moiety thereof, to the use of the said Arabella for life; remainder to trustees to preserve contingent remainders; remainder to her first and every other son, being a Protestant; with several remainders over; and, as to the other moiety, to his daughter Ireland's son, in like manner.

Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall in 1723 attained her full age; and upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life; remainder to her intended husband for life; remainder to the issue of her body; and such conveyance was executed by one of the trustees. But Mr. Bosville, the other trustee, who was also a remainderman, refused to convey. However, she [*3] having by this conveyance a legal estate tail in *one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730 married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her; and as to her own estate, she covenanted to settle it upon the Lord Glenorchy and herself for life; remainder to the first and every other son of the marriage, in tail male; and, upon failure of such issue, to the survivor of the said husband and wife, in fee.

The bill was, to have a conveyance of the moiety of the said trust-estate from Mr. Bosville to such uses as are limited in the said covenant; and the principal question was, whether, under the said will, the Lady Glenorchy was tenant for life or in tail? upon which two other questions arose, viz. first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail? secondly, if so, whether the court will make any difference between a legal title and a trust estate executory?

[*Lord Chancellor King.*—I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise; but when you apply to this court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law to follow the testator's intent; which will also bring on another question,—What is the testator's intent in the present case?]

Upon the second question, it was argued for the plaintiffs, that the Lady Glenorchy was, under this will, entitled to an estate tail in equity; for this Court puts the same construction upon limitations of trusts in equity as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of Nottingham in the *Duke*

of *Norfolk's case*;¹ and the authority of *Baile v. Coleman*, 2 Vern. 670,² where a trust to one for life, remainder to the heirs male of his body, is held an estate tail, has never yet been questioned. So it is held in *Legatt and Sewell's case*, 2 Vern. 551, (but more fully reported in Abr. Eq. Ca. [*4] *394,)³ where money was given to be laid out in land to one for life, and after his decease to his heirs male, and the heirs male of the body of every such heir male, severally and successively one after another; and a case being made for the opinion of the judges, as of a legal estate, they certified it to be an estate tail. So, in the case of *Bagshaw v. Downes*, or *Bagshaw v. Spencer*, at the Rolls, Hil. 6 Geo. 2,⁴ an executory trust was directed to the judges for their opinion as a legal estate. Upon the same reason do cestuis que trust levy fines and suffer recoveries, which are held good in this court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the heirs of their two bodies, this Court will decree a conveyance in strict settlement, if any of the parties apply here, because the children are looked upon as purchasers. But in a will it is otherwise; they take through the bounty of the testator, and in such words as he gives it.

It was further insisted for the plaintiffs, that the words *issue of her body* would make a difference from all other cases; for, in the Statute De Donis, which created entails, it is said to be a proper word for that purpose, and is used no less than ten times in that statute; for this the authority of *King v. Melling*, 1 Vent. 214, 225,⁵ and the reason there given, cannot be contested, which is also an authority in the principal case; for there it is held, that a devise to one for life, with a power to make a jointure, is much stronger to show the intent of the testator than the words *without impeachment of waste*. To A. for life, remainder to the issue of her body, and, for want of such issue, remainder over, was held an estate tail in the Court of Exchequer, in the case of *Williams v. Thompson*, about three or four years ago. Anders. 86. To one for life, remainder to the children of his body, is an entail. So in *Wylde's case*, 6 Co. 16, and *Sweetapple v. Bindon*, 2 Vern. 536.

It was further argued, that, if the remainder in this case to the issue be construed to be words of purchase, they must be attended with the greatest absurdity; for in *what manner can the issue take? All the sons, [*5] daughters, and grandchildren are issue; and if they take as purchasers, they must be joint-tenants, or tenants in common, and that for life only,⁶ 2 Vern. 545; which construction can never be agreeable to the testator's intent; and whatever estate was given in the first part of the will, yet the words, "*and for want of such issue, then,*" &c., will give the plaintiff an estate tail, according to the cases of *Langley v. Baldwin*, and *Shaw and Weigh*, Abr. Eq. Ca. 184, 185, Fitzg. 7. It was also further urged, that, from the face of the whole will, and by comparing this clause with the other, it appears that the testator intended the plaintiff, the Lady Glenorchy, should

¹ 3 Ch. Ca. 26-47; and 2 Swanst. 454.

² 2 S. C., 1 P. Wms. 142; 1 Ves. 151.

³ S. C., 1 P. Wms. 87; see 2 Ves. 657.

⁴ *Bagshaw v. Spencer*, 2 Atk. 246, 570; on appeal, id. 577.

⁵ S. C., 2 Lev. 58, 61.

⁶ *Cook v. Cook*.

take an estate tail, and that the several clauses in a will are to be taken together, and make but one conveyance; and that it was a proper argument to prove the intention of the party from the different penning of the several clauses. The person who drew the will knew how to convey, either by words of limitation or purchase, where there was occasion for it; for where he limits the estate to Mrs. Ireland, it is in strict settlement by proper words of purchase; and so where he limits it to the Lady Glenorchy, in case she had married a Papist. But further, to show he well understood the doctrine of conveyances, when he limits by words of purchase to sons not in esse, he has put in trustees to preserve contingent remainders, which he would certainly have done in this case had he intended the Lady Glenorchy an estate for life only.

For the defendant it was argued, that though in the construction of wills in this Court, uses and trusts are to be governed by the same rules as legal estates, and that there is but little difference between uses and trusts executed and legal estates; yet trusts executory are by no means under the same consideration. In the cases of *Legatt v. Sewell*, and *Baile v. Coleman*, the Judges were divided in their opinions, and since that time there is an express authority for the defendant. In the case of *Papillon v. Voice*, Hil. 5 Geo. 2;¹ so likewise in the case of the *Attorney-General v. Young*, in the Court of [*6] Exchequer; *and the case of *Leonard v. Earl of Sussex*, 2 Vern. 526; as also in the case of *Bramston v. Kinaston*, heard at the Rolls in June, 1728, where an estate was given by the testator to be settled upon his grandchild for her life, remainder to the issue of her body; and, when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. And to show that this Court is not tied up to the rules of law in cases of executory trusts, the case of the *Earl of Stamford v. Sir John Hobart*, concerning Serjeant Maynard's will, was cited, where an estate was given to trustees to convey one moiety to Sir John Hobart, for ninety-nine years, in case he should so long live, with several remainders over; and this Court decreed the Master should settle the conveyance according to the letter of the will; but upon exceptions to the Master's Report, Nov. 19, 1709, it was ordered that proper estates should be made to support the remainders, that the testator's intent might not be frustrated; and this resolution was affirmed in the House of Lords.² So, in all matters executory, this Court endeavors to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements it was never doubted but that this Court would carry any words into strict settlement, if the intent of the parties was such; and so held in the case of *West v. Erisey*, in the House of Lords;³ and in that of *Trevor v. Trevor*, Abr. Eq. Ca. 387;⁴ and the same rules will prevail in all cases executory, whether wills or articles. Besides, the present case is very much like that of marriage articles. The testator had all along the marriage of his grand-daughter in view, and intended this will as no more

¹ 2 P. Wms. 471.

² 3 Bro. P. C. 31, Toml. ed. 30th Mar. 1710.

³ 1 Bro. P. C. 225, Toml. ed., overruling the decision of the Barons of the Exchequer, reported 2 P. Wms. 349.

⁴ S. C., 1 P. Wms. 622; 5 Bro. P. C. 122, Toml. ed.

than heads or directions for the trustees in what manner he would have it settled ; and so it remains to be carried into execution by the aid of this Court.

Then as to the word *issue*, it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in *Wyld's case*, 6 Co. 16, where to one and his children is held to be an estate tail ; yet had it been to one for life, remainder to his children, there can be no *doubt but that it had been [*7] a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, why shall it not be as in cases where the limitation is to the first and every other son, and wherever heirs of the body are held to be words of purchase, they are construed to the first and every other son.

To make an estate tail arise by implication upon the words "*and for want of such issue*," has been cited the case of *Langley v. Baldwin*, Abr. Eq. Ca. 185. But there is the case of *Bamfield v. Popham*, 2 Vern. 427, 449, for the defendant, so the case of *Loddington v. Kime*, 3 Lev. 431, and that of *Backhouse v. Wells*, Abr. Eq. Ca. 184 ; besides, it is a general rule, that where an estate is to be raised by implication, it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever ; and in the present case, there is the word "*issue*" mentioned before ; so that these last words must relate to the issue before mentioned. Whereas in the case of *Langley v. Baldwin*, the limitation is to six sons only ; then come the words "*and for want of issue*," which words could not have relation to any thing before mentioned.

LORD CHANCELLOR TALBOT had taken time to advise, and to have the opinion of the judges upon this case : And the same coming now again to be argued upon the same points that had been before the late Lord Chancellor (Lord King),

It was insisted by the plaintiffs' counsel, that the Lady Glenorchy's marrying a Protestant of the Church of England at or after the age of twenty-one, or, if under that age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent : which, when performed, would give her an estate tail. That this intent appeared from the different penning of the several clauses in this will ; for it provides, in case she should not marry such a person as is before described, that she should have but a moiety for *life, and trustees are appointed to preserve contingent remainders ; none of which are enjoined in case she should marry [*8] a Protestant of the Church of England ; which shows a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail ; and so it was held in the case of *King v. Mel-ling*, 1 Vent. 214, 225, notwithstanding the proviso there, empowering the devisee to make a jointure ; so if in this case the land itself had been devised to the Lady Glenorchy, it would have made an entail at law ; and there is no difference between an entail of a legal estate and of an equitable one. *Wyld's case*, 6 Co. 16, devise to a man and his children, who had then two children alive,

the devisee took but for life ; but in *King v. Melling*, 1 Vent. 214, 225, Lord Hale said, that had there been no children living, in that case of *Wyld*, i would have been an estate tail ; though children be not so strong a word as issue ; which in many statutes, particularly the Statute De Donis, takes in all the children. In *Shelley's case*, 1 Co. 88 b, it is said, that if there be a gift to one for life, be it by deed or will, and afterwards comes a gift to the heirs of his body, it is an entail ; otherwise, indeed, if the limitation be to the heirs male of such heir male, as in *Archer's case*, 1 Co. 66, there it would make but an estate for life ; because the limitation there is grafted upon the word "heirs." So, in the case of *Backhouse v. Wells*, in B. R. 1712, Abr. Eq. Ca. 184, the devisee took but for life, the limitation being there grafted upon the word "issue ;" which for that reason was taken to be only a description of the person in that case ; but in *Cosen's case*, Owen, 29, and in *Langley v. Baldwin*, Abr. Eq. Ca. 185, the estate tail was raised by implication ; which shows that an estate tail may pass not only by express words but by implication also. In *King v. Melling*, the Lord Hale said upon *Wyld's case*, "That had it been to the children of the body, it would have passed an entail ; and yet none of those [*9] cases seem so strong as the present. So, in the *case of *Cook v. Cook*, 2 Vern. 545, it is said, "That a devise to one and his children, if there be no children living, will be an estate tail."

The exception of waste is next to be considered ; and had it not been for that, this would clearly have passed an entail ; but this exception varies not the case, for here the estates must disjoin (according to *Bowles's case*, 11 Co. 79 b,) to let in the husband's estate, which must intervene between her estate and that of her issue ; and the power of committing waste, (*voluntary waste in houses excepted*), was given only to make her dispunishable of waste during the time she should be tenant for life only ; which she must be until her husband's death, by reason of the remainder to him, but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words "*without impeachment of waste*," can alter nothing ; for if she was tenant in tail, she had already in her that power which these words would give her ; and the expressing the power which was already in her could no more abridge her estate (according to the maxim of *Expressio eorum quæ tacitè insunt nil operatur*), than the power of making the jointure did in *King and Melling's case*. In *Langley and Baldwin's case*, there were the same words as here ; and that of *Shaw and Weigh*, or *Sparrow v. Shaw*,¹ Abr. Eq. Ca. 184, which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail ; which was a much stronger implication to make the sister to be but tenant for life than any in the present case. And in *Baile and Coleman's case*, 2 Vern. 670, an estate tail was decreed by the Lord Harcourt, notwithstanding the power of leasing given to Christopher Baile. Nor can the other words *voluntary waste in houses excepted*, carry the implication further than the former ; since this Court will often restrain a tenant for life without

¹ 3 Bro. P. C. 120, Toml. ed.

impeachment of waste, from committing waste, notwithstanding his power, as was declared by the Earl of Nottingham in *William's and Day's case*, 2 Ch. Ca. 32, who there said, that he would *stop the pulling down of houses [*10] or defacing a seat by tenant in tail after possibility of issue extinct, or by tenant for life, though dispunishable of waste by express grant or by trust; and the like has been since done in the case of *Vane v. Lord Barnard*, 2 Vern. 733. By comparing this with the other clauses of this will, it appears plainly that the testator did not intend the Lady Glenorchy a less estate than to the other devisees; but that his design was to prefer her and her issue to that of Mrs. Frances Ireland, though Frances was dead at the time of the will; and that her son, who could expect no more favor than his mother could, had she been living, should not have an immediate estate tail, and so a greater estate than she who was intended to be most preferred. It is plain the testator well knew the difference between giving an estate for life and an estate tail, by the different wording of the clauses of this will. In that, whereby he devises the remainder to Mr. Bosville, these words are purposely omitted; and in others he gives the Lady Glenorchy several estates, according to her marrying such or such persons, Protestants or Papists; and, consequently, he must be thought to have intended her a greater estate upon her performing than upon her not performing the condition. If, therefore, these words would create an estate tail at law, the construction will be the same here, since a Court of equity ought not to go further than the Courts of law; as was held by Lord Cowper in the case of *Legatt v. Sewell*, 2 Vern. 551, Abr. Eq. Ca. 394, and was also held by Lord Harcourt in the case of *Baile v. Coleman*, 2 Vern. 670, where he takes a difference between cases arising upon wills and cases arising upon marriage articles, where the persons being all purchasers, the agreement is to be carried into stricter execution than in the case of a will, where, the parties being but volunteers, the words must be taken as you find them. The same is held totidem verbis in the case of *Sweetapple v. Bindon*, 2 Vern. 536, where it is said, "That in a devise, all being volunteers, the devisee's estate is not to be restrained, nor is there any argument to be drawn from this *being an executory trust, since the case of *Baile v.* [*11] *Coleman* was such, and looked upon as such by the Lords Cowper and Harcourt; and the case of *Leonard v. Earl of Sussex*, 2 Vern. 526, is widely different from ours, for there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

It was argued for the defendant by Mr. *Attorney-General*, Mr. *Verney*, and Mr. *Fazakerley*, that the Lady Glenorchy could take but an estate for life; and they took a difference between the present case, being of an executory trust, and those of *Cosen's*, and of *Cook v. Cook*, which were legal estates and executed. The resolution in *Sunday's case*, 9 Co. 127 b, (which was likewise of a legal estate) was chiefly founded upon the proviso, restraining the son or his issue from aliening, which made the argument that he was intended by the testator to be tenant in tail, since, if he had been but tenant for life, the restraint had been vain and needless. In the case of *Langley v.*

Baldwin, an estate tail was raised by implication upon the words, "if he die without issue male;" because the devise extending no further than the sixth son, no son born after could have taken; but the heir-at-law must have been preferred; whereas his intent was to provide equally for all his sons, and, therefore, the raising an estate tail by implication (besides that it was in the case of a legal estate) was carrying the testator's intent into execution. The case of *King v. Melling* has, indeed, gone very far, but has always been looked upon as the ne plus ultra, beyond which no Court would ever go. This appears from the resolution in the case of *Backhouse v. Wells*, where the parties' intent prevailed against the doctrine now insisted on. But it is said, the word *issue* is always a word of limitation. In that of *Sweetapple v. Bindon*, the words did of themselves carry an estate tail, and there was no intent appearing to the contrary. And in *Legatt v. Sewell*, one judge was of opinion it was but an estate for life, and that case was afterwards agreed.

[*12] The difference which was insisted on in the former *argument, and is still strongly relied on for the defendant, between legal estates and trusts executed, and trusts executory, is evident, and appears plainly from the case of *Leonard v. Earl of Sussex*, where the words were much stronger to create an estate tail than they are here; but yet, in that case, the Court declared, that, it being a trust executory, the provision should be looked upon as strong for the benefit of the issue, as if it had been in marriage articles; and that the testator's intent (appearing by the subsequent words), "*that none should have power to dock the entail*" should be observed, therefore decreed but an estate for life. This difference appears likewise from the cases of *White v. Thornborough*, 2 Vern. 702, and *Trevor v. Trevor*, Eq. Ca. Ab. 387, and from that of *Papillon v. Voice*, Hil. 5 Geo. 2, which is not distinguishable from our case, except that there were trustees appointed in that case to preserve contingent remainders, which are not in this. But notwithstanding that provision, the late Lord Chancellor¹ declared, in that case, that the limitation, had it been by act executed, would have created an estate tail; but that the trust being executory, and to be carried into execution by the assistance of this Court, he would keep the parties to the observance of the testator's intent, which plainly governs the present case; and by all those it appears that the testator's intent is as much to be observed in cases of executory trusts as of marriage articles. If, therefore, the testator's intent is to be observed, and that no words which may have any operation are to be rejected, it plainly appears from this and the other clauses of this will, that Sir Thomas Pershall intended this lady only an estate for life. It is true, indeed, that the word "*issue*" in a will is generally a word of limitation, and creates an estate tail; but that is only where no intent appears to control it. And in every clause of this will, where he intends only an estate for life, he mentions the words "*for life*;" and where he intends an estate tail, there is not a word mentioned

[*13] of impeachment of waste, which shows he knew what he was doing when he inserted this exception, and was not ignorant of *the opera-

¹ King.

tion these words would have on the several estates. And these words were, in the case of *Loddington v. Kime*, 3 Lev. 431, taken to be a strong implication of the testator's meaning to give but an estate for life, notwithstanding the other words, which seemed to carry an entail. Nor is there any color for what has been insisted on for the plaintiffs, that the power of committing waste, with the restraint of voluntary waste in houses, was designed only to attend on her estate for life, till, by her husband's death, she should come to be tenant in tail, since no more could be meant by it than to restrain her from defacing or pulling down houses while she was in her husband's power, the testator not knowing who her husband might be. This power of committing waste has been compared to the power of leasing in the case of *Baile v. Coleman*, though they are widely different; nor can it be compared to that of making a jointure in *King and Melling's case*; for, since tenant in tail cannot make a jointure without a recovery, the power was as proper to be annexed to an estate tail as to an estate for life, which was one of the reasons of Lord Hale's opinion in that case. In our case, to serve the intent of restraint of waste in houses, she must be decreed but an estate for life; if it be an estate tail, she will be enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary. Nor will the answer that has been given to this, that she might be restrained in this Court, avail; since no instance can be shown where a tenant in tail has been restrained from committing waste by injunction of this Court.

[*Lord Chancellor*.—That was refused in Mr. *Saville's case*,¹ of Yorkshire, who, being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death, to a very great value; the remainderman applied here for an injunction to restrain him, but could not prevail.]

The other objection, that Sir Thomas Pershall could *never intend [*14] the Lady Glenorchy a less estate than the children of his other granddaughter, Frances Ireland, turns rather against the plaintiff; for the testator's intent was to provide for the Lady Glenorchy's children preferably to those of Frances Ireland, and therefore he makes the lady herself but tenant for life, and her children tenants in tail. Nor is anything more common than to limit an estate for life only to the first taker, by which the intent of providing for children is better answered than if the first taker was made tenant in tail. Nor will there in this case follow the inconvenience that has been mentioned, by making the issue to be purchasers, viz. that the issue must take jointly, and take estates for life only; for if issue be nomen collectivum, as has been insisted for the plaintiffs, why may it not be so as well where they take by purchase, as where they take by limitation? especially where the testator's intent, that they should take successively, and by seniority of birth, is as well served by their taking one way as the other. And if the word *issue* be tantamount to the word *heirs*, as it has been agreed to be, they have answered themselves. In the case of *Burchett v. Durdant*, 2 Vent. 311, and in 2 Lev. 232, by the

¹ See Mos. 224.

name of *James v. Richardson*, the words, "*heirs of the body*," were held to be words of purchase, by reason of the words "*now living*," which came just after, and yet were at the same time determined to carry an estate tail, the word "*heirs*" being nomen collectivum; and if so, in case of a legal estate executed, much more ought this construction to hold here; this will being meant by the testator only as heads of a settlement to be made, and so may well be thought not to have been so accurate in the wording as if the conveyance were then to have been drawn up with advice of counsel, and all other assistances to make it formal.

LORD CHANCELLOR TALBOT.—Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn; the testator having expressed himself variously
 [*15] *in many, if not in all of them. It is plain, that by the first part of this will he intended her but an estate for life till marriage; then comes the clause upon which the question depends. But before I give my opinion of that, I must observe, that the trustee has not done right; for nothing was to vest till after her marrying a Protestant. The trustee therefore by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is, what estate she shall take? And *first*, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only; so likewise of the remainder to the husband: But then come the words "*remainder to the issue of her body*," upon which the question arises. The word "*issue*" does, *ex vi termini*, comprehend all the issue; but sometimes a testator may not intend it in so large a sense, as where there are children alive, &c. That it may be a word of purchase is clear, from the case of *Backhouse v. Wells*, and of limitation, by that of *King v. Melling*; but that it may be both in the same will has not nor can be proved. The word "*heirs*" is naturally a word of limitation; and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will; but should the word "*issue*" be looked upon as both, in the same will, what a confusion would it breed; for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, whether Sir Thomas Pershall intended the Lady Glenorchy's issue to take by descent or by purchase? If by purchase, they can take but for life, and so every issue of that issue will take for life; which will make a succession ad infinitum, a perpetuity of estates for life. This inconvenience was the reason of Lord Hale's opinion in *King and Melling's case*, that the limitation there created an estate tail. It may be, the testator's intent is by this construction
 [*16] rendered a little precarious; but that is from the power of the law *over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it, will defeat the estate: No, the power shall

be void. But there the power is annexed to the estate for life, which she took first; and therefore I am rather inclined to think it stronger than *King* and *Melling's case*, where there was no mediate estate, as there is here to the husband; there, there was an immediate devise, here a mediate one; so the applying this power to the estate for life, carries no incongruity with it. As the case of *King v. Melling*, has never been shaken, and that of *Shaw v. Weigh*, or *Sparrow v. Shaw*, which went up to the House of Lords, was stronger, I do not think that Courts of equity ought to go otherwise than the Courts of law; and therefore am inclinable to think it an estate tail as it would be at law.

But there is another question, viz. How far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think, *in cases of trusts executed or immediate devises, the construction of the Courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made; But in executory trusts he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner.* The case of *Leonard v. The Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void; but *being an executory trust, the Court decreed according to the intent as it was found expressed in the will, which must now govern our construction.* And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this Court to direct their trustees. I have already said what I should incline to, if this was an immediate devise; but as it is executory, and that such construction may be made as that the issue may take without any of *the inconveniences [*17] which were the foundation of the resolution in *King* and *Melling's case*, and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, viz. to the Lady Glenorchy for life, remainder to her husband the Lord Glenorchy for life, remainder to their first and every other son, with a remainder to the daughters, will best serve the testator's intent. In the case of *Earl of Stamford* and *Sir John Hobart*, Dec. 19, 1709, it appeared that, for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the Act of Parliament to take effect, might have been avoided; and therefore the Lord Cowper did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legatt v. Sewell*, the words, *if in a settlement*, would have made an estate tail; and in that of *Baile v. Coleman*, the execution was to be of the same estate as he had in the trust, which in construction of law was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon v. Voice* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other.

And so decreed the Lady Glenorchy but an estate for life, with remainder, &c.

LEGG v. GOLDWIRE.

REPORTED CAS. TEMP. TALBOT, 20.

NOV. 10TH, 1736.

N.B. By LORD CHANCELLOR TALBOT.—Where articles are entered into before marriage, and a settlement is made *after* marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue,) this Court will set up the articles against the settlement; [*18] but where both articles and settlements are *previous* to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles.¹ And although, in the case of *West v. Errisey*,² Mich. 1726, in the Court of Exchequer, and afterwards in the House of Lords, in 1727, the articles were made to control the settlement made before marriage, yet that resolution no way contradicts the general rule; for in that case the settlement was expressly mentioned to be made *in pursuance and performance of the said marriage articles*, whereby the intent appeared to be still the same as it was at the making of the articles.

“*Lord Glenorchy v. Bosville*, in Lord Talbot’s time,” observes Lord Hardwicke, “has established the distinction between trusts executed and executory:” *Bagshaw v. Spencer*, 2 Atk. 582. His Lordship, however, in the same case, almost denied that any such distinction existed, although he afterwards fully admitted it (see *Exel v. Wallace*, 2 Ves. 323; *Bastard v. Proby*, 2 Cox, 8); and it has since been recognized by a long series of decisions. See *Austen v. Taylor*, 1 Eden, 367, 368; *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227; *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; *Blackburn v. Stables*, 2 V. & B. 369; *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 233; S. C., nom. *Tollemache v. Coventry*, 2 C. & F. 611; *Douglas v. Congreve*, 1 Beav. 59; S. C., 4 Bing. N. C. 1, 5 Bing. N. C. 318; *Boswell v. Dillon*, 1 Dru. 297. See also *Earl of Stamford v. Sir John Hobart*, 3 Bro. P. C. 33, Toml. ed.; *Papillon v. Voice*, 2 P. Wms. 471.

It is proposed in this note to consider the distinction between trusts *executed* and *executory*, and the consequences which result from it with reference to the limitation of estates.

A trust is said to be *executed* when no act is necessary to be done to give effect to it, the limitation being originally complete, as where an estate is con-

¹ See, however, *Bold v. Hutchinson*, 5 De G. Mac. & G. 558, 567.

² 2 P. Wms. 349; 3 Bro. P. C. 327; *Collectanea*, Jur. 463.

veyed or devised unto and to the use of A. and his heirs in trust for B. and the heirs of his body.

A trust is said to be *executory* where some further act is necessary to be done by the author of the trust, or the trustees, to give effect to it, as in the case of marriage articles, and as in the case of a will where property is vested in trustees in trust to *settle* *or *convey* in a more perfect and accurate [*19] manner; in both which cases a further act, viz. a settlement or conveyance is contemplated.

It is now clearly established, as laid down by Lord Talbot in *Lord Glenorchy v. Bosville*, that a Court of equity, in cases of *executed trusts* will construe the limitations in the same manner as similar legal limitations. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of A.'s body, the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail; see *Wright v. Pearson*, 1 Eden, 119; *Austen v. Taylor*, 1 Eden, 361; *Jones v. Morgan*, 1 Bro. C. C. 206; *Jervois v. Duke of Northumberland*, 1 J. & W. 559; clearly overruling the opinion expressed by Lord Hardwicke in *Bagshaw v. Spencer*, 2 Atk. 577, when he erroneously reversed the decision of Sir Joseph Jekyll, M. R. See also *Boswell v. Dillon*, 1 Dru. 291.

In cases, however, of *executory trusts*, where, according to Lord Talbot's observation in *Lord Glenorchy v. Bosville*, *something is left to be done*, viz. *the trusts are left to be executed in a more careful and more accurate manner*, a Court of equity is not as in cases of *executed trusts*, bound to construe technical expressions with legal strictness, but will mould the trusts according to the intent of those who create the trusts.

A mere direction, however, *to convey*, upon certain trusts, will not render those trusts executory, in the sense in which the word is used in this note, if the author of the trust has, as it were, taken upon himself to be his own conveyancer, and, instead of leaving anything to be done beyond the mere execution of a conveyance, has defined what the trusts or limitations are to be in accurate and technical terms. "All trusts" observes Lord St. Leonards, "are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a Court of equity puts upon the term 'executory trust.' A Court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out, from *general expressions*, what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?" *Egerton v. Earl of Brownlow*, 4 Ho. L. Cas. 210, and see *Ib.* pp. 49, 60, 61, 181, *188, 209; *Austen v. Taylor*, 1 Eden, Rep. 361, 367, 368; *Wight* [*20] *v. Leigh*, 15 Ves. 564, 568; *Graham v. Stewart*, 2 Macq. Ho. L. Cas. 295, 325; *Herbert v. Blunden*, 1 Dru. & Walsh, 78, 89, 91; *East v.*

Twyford, 9 Hare, 713, 733; *Doncaster v. Doncaster*, 3 K. & J. 26; and though there is a direction by the testator to the trustees to correct any defect or incorrect expression in his will, and to form a settlement from what appears to them to be his meaning, it will not authorize any change in the limitations, *Stanley v. Stanley*, 16 Ves. 491, 511.

It is observed by Lord Talbot, in *Lord Glenorchy v. Bosville*, that the rule is not generally true, that in articles and executory trusts (meaning executory trusts in wills) different constructions are to be admitted. This is correct, with the qualification or distinction that, in executory trusts under marriage articles, the intention of the parties may fairly be presumed *a priori* from the nature of the transaction; in executory trusts in wills, it must be gathered from the words of the will alone. Lord Eldon seems to have denied this distinction in *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227, 230; but see his explanation in the case of *Jervoise v. Duke of Northumberland*, 1 J. & W. 574. The distinction has been well put by Sir William Grant, M. R., in *Blackburn v. Stables*, 2 V. & B. 369: "I know," observes his Honor, "of no difference between an executory trust in marriage articles and in a will, *except* that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision, by the settlement of an estate, for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another,—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but, if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions which he has employed, in their strict, proper, technical sense, the Court, in decreeing such settlement [*21] as he has directed, will depart from his *words in order to execute his intention." In *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 260, Sir J. Leach, V. C., observes, as to the distinction between marriage articles and a will, "you are guided to the meaning of articles by the plain object of consideration in them, the issue of the marriage; but you know nothing of the motive and object of a will, but what you collect from the language of it." See also *Maguire v. Scully*, 2 Hog. 113; *Stratford v. Powell*, 1 Ball and B. 25.

In consequence of the distinction adverted to, it will be most convenient to consider executory trusts under marriage articles, and executory trusts under wills, separately.

1. *As to Executory Trusts under Marriage Articles.*—If, in articles before marriage, for making a settlement of the real estate of either the intended

husband or wife, it is agreed that the same shall be settled upon the heirs of the body of them or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case*, give either of them an estate tail, and enable either of them to defeat the provision for their issue, Courts of equity, considering the objects of the articles, viz. to make a provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail, as purchasers. Thus, in *Trevor v. Trevor*, (1 Eq. Ca. Abr. 387; S. C., 1 P. Wms. 622,) A., in consideration of an intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs males of him on her body to be begotten, and the heirs males of such heirs males issuing, remainder to the right heirs of the said A. for ever, Lord Macclesfield said, that upon articles the case was stronger than on a will; that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they came to be carried into execution, as to make them effectual; that the intention was to give A. only an estate for life; that, if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in A.'s power, as soon as the articles were made, to have destroyed them. And his Lordship therefore held, that A. was entitled to an estate for life only, and that his eldest son took by purchase as tenant in tail. This decision was affirmed on appeal in the House of Lords: 5 Bro. P. C., Toml. ed. 122. In *Streatfield v. Streatfield*, Ca. t. Talb. 176, (selected as a leading case on another point,) T. S., by *articles, agreed to settle lands to the use of [*22] himself and M. his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said T. S., on his wife begotten, with other remainders over. After marriage, by a deed reciting the articles, he settled the lands to the use of himself and his wife for their lives and the life of the longest liver of them, without impeachment of waste during the life of T. S.; and after their decease, to the use of the heirs of the body of the said T. S. on the said M. to be begotten; and for want of such issue, to the right heirs of T. S. Lord Talbot held, that the settlement was not a proper execution of the articles, and said that it could not be doubted, but that, upon application to the Court for carrying the articles into execution, it would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing; and that the nature of the provision was strong enough, without express words. See also *Jones v. Laughton*, 1 Eq. Ca. Abr. 392; *Cusack v. Cusack*, 5 Bro. P. C., Toml. ed. 116; *Griffith v. Buckle*, 2 Vern. 13; *Stonor v. Curwen*, 5 Sim. 268, 269; *Davies v. Davies*, 4 Beav. 54.

Where in marriage articles the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favor of daughters as well as sons, viz. on first and other sons successively in tail, with remainder to the daugh-

ters as tenants in common in tail, with cross remainders between them: *Nandick v. Wilkes*, Gilb. Eq. Rep. 114; S. C., 1 Eq. Ca. Abr. 393, c. 5; *Burton v. Hastings*, Gilb. Eq. Rep. 113; S. C., 1 Eq. Ca. Abr. 393; *Hart v. Middlehurst*, 3 Atk. 371; *Maguire v. Scully*, 2 Hog. 113; S. C., 1 Beat. 370; *Burnaby v. Griffin*, 3 Ves. 206; *Horne v. Barton*, 19 Ves. 398, Coop. 257, S. C., on an application for a rehearing, 26 L. J. N. S. (Ch.) 225.

Where it is agreed to settle real estate to the use of the intended husband for life, remainder to the heirs male of his body, remainder to the heirs female of his body, the words "heirs female" will be held to mean daughters of the marriage, and a settlement will be made upon them as tenants in common in tail, with cross remainders between them; *West v. Errissey*, 2 P. Wms. 349; Comyn's Rep. 412, 1 Bro. P. C., Toml. ed. 225. A limitation, however, to the heirs of the body, following after a remainder to the first and other sons of the marriage in tail male, and a remainder to heirs male generally, will not, it seems, be so construed in favor of the daughters of the marriage, especially where portions *are by the articles expressly provided for them: [*23] *Powell v. Price*, 2 P. Wms. 535.

The principle upon which Courts of equity, in such cases as have been considered, decree a strict settlement, seems to be this, viz. to give effect to the presumed intention of the parties to the articles, to make such a provision for the issue of the marriage as it would not be in the power of *either* parent to defeat; where, however, articles are so framed that the concurrence of *both* parents is requisite, in order to defeat the provision for the issue, the same principle does not apply, as it might have been the intention of the parties to the articles, that the husband and wife should *jointly* have such power. Thus, where the husband has by articles agreed to settle *his own property* upon himself for life, remainder to his wife for life, with remainder to the heirs of the body of the wife by him, as she would in this case be tenant in tail *ex provisione viri*, and consequently could not, if the property were settled upon her previous to 3 & 4 Will. 4, c. 74, bar the entail without the concurrence of her husband, a settlement making the issue take by purchase would not be decreed: *Whately v. Kemp*, cited in *Howel v. Howel*, 2 Ves. 358; *Honor v. Honor*, 1 P. Wms. 123; *Green v. Ekins*, 2 Atk. 477; *Highway v. Banner*, 1 Bro. C. C. 584. As, however, the statute 11 Hen. 7, c. 20, has been repealed as to estates *ex provisione viri* by 3 & 4 Will. 4, c. 74, s. 16, this exception from the general rule will cease to be part of the law: *Rochfort v. Fitzmaurice*, 2 D. & W. 19.

So, also, where it appears on the face of the articles that the parties themselves knew and made a distinction between limitations in strict settlement, and limitations leaving it in the power of *one* of the parents to bar the issue, a strict settlement will not be decreed. Thus, where by articles part of an estate was limited to the husband for life, remainder to the wife for life, remainder to the first and every other son and daughters in tail, and another part to the husband for life and the heirs male of his body by that wife, Lord Macclesfield said, that, if the latter had been the sole limitation, he should without scruple decree in strict settlement, according to the common rule;

but where the parties had shown they knew the distinction when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation, decreeing to the father in tail as to the last, though not as to the first: *Anon.*, cited 2 Ves. 359; *Howel v. Howel*, 2 Ves. 358; *Powell v. Price*, 2 P. Wms. 535; *Chambers v. Chambers*, Fitzg. Rep. 127; S. C., Mos. 333, 2 Eq. Ca. Abr. 35, c. 4; *Highway v. Banner*, 1 Bro. C. C. 584.

Where words in articles for a *settlement would, if interpreted in [*24] their strict legal sense, create a joint-tenancy among the children of the marriage, equity will decree a settlement upon them as tenants in common; for a joint tenancy as a provision for the children of a marriage is an inconvenient mode of settlement, because during their minorities no use can be made of their portions for their advancement, as the joint-tenancy cannot be severed: *Taggart v. Taggart*, 1 S. & L. 88.

It may be here mentioned, that although, properly speaking, a marriage settlement ought to be executed, in order to carry the executory provisions of marriage articles into effect, the Court has, where the property was personal, at the request of the parties, in order to save expense, made a declaration as to the true meaning of the articles, upon which the parties were able to act, without causing a formal instrument to be prepared and executed: *Byam v. Byam*, 19 Beav. 58, 63.

Covenant to settle chattels on the same trusts as realty.]—Where a person has agreed or covenanted to settle chattels upon the same trusts as have been declared of real estate in strict settlement, viz. upon first and other sons successively in tail, a Court of equity, upon the principle of carrying into effect the intent of the parties as far as possible, the trust being executory, will order a clause to be inserted in the settlement of the chattels—that the tenant in tail should not under the limitations be entitled to the absolute property in the chattels “unless he should attain the age of twenty-one years,” or “unless he should die under twenty-one, leaving issue;” for if such clause is not inserted, the first tenant in tail of the real estate will, immediately upon his birth, acquire an absolute interest in the chattels, transmissible upon his death to his personal representatives; and, previous to the late Wills Act, (1 Vict. c. 26,) he might, upon attaining the age of fourteen, have disposed of them by will. In *Stanley v. Leigh*, 2 P. Wms. 690, Sir Joseph Jekyll said the usual course was to insert a limitation over “on dying under twenty-one.” Lord Hardwicke, however, in *Gower v. Grosvenor*, (Barn. C. Rep. 63; S. C., 5 Madd. 348,) said the common and known way of conveyancers was to insert a limitation over “on dying before the age of twenty-one and without issue.” See *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387, in which case there was a covenant in a marriage settlement to settle leaseholds in trust for such persons and for such or the like ends, intents, and purposes, *as far as the law in that case would allow and permit*, as were declared concerning certain real estates which were limited to A. for life, remainder to his first and other sons in tail male, remainder to B. for life, remainder to B.’s [*25] first and *other sons in tail male, remainders over. A. died, leaving a

son who lived only nine months. Lord Loughborough stated it to be his decided opinion, that in cases of marriage articles, where leasehold property was covenanted to be settled upon the same limitations as freehold estate, and the limitations of the freehold estate were to all the sons successively in tail, the settlement to be made of the leaseholds ought to be analogous to that of the freeholds, so that no child born and not attaining twenty-one should by his birth attain a vested interest to transmit to his representatives, and thereby defeat the ulterior object of the articles, which were not in favor of one son, but equally extended to every son; and his Lordship (admitting the law as laid down in *Vaughan v. Burslem*, 3 Bro. C. C. 101, to be applicable to wills) observed that "it is not true that you are to do for the testator all that can be done by law. You are to do for the testator no more than what he has intended to be done, and according to the common acceptation of the words. But," said his Lordship, "I wish to put it to you, whether in the nature of things there is not a radical and essential difference between marriage settlements and wills? The parties contract upon a settlement for all the remainders. They are not voluntary, but within the consideration. The issue, then, are all purchasers. Suppose, then, a settlement to be made of freehold estate, and as to the leasehold there is only this article, that the settlement shall be analogous to that of the freehold; do I execute it and make a like settlement by giving an interest which cuts off all the issue? Suppose the whole subject was leasehold estate, and stood upon an article that it should be conveyed according to the limitations of an honor, and a bill was brought to carry that settlement into effect after a child had lived a day, should I permit the father to say it was his property? It is utterly impossible to make the identical settlement of the leasehold estate as of the freehold; but if I am to make it in analogy to the settlement of the freehold, shall I not carry it on to all the near events? and shall they fail because I cannot embrace all the remote events?" And his Lordship thought there was no objection to a proviso that no person should be entitled to the absolute property unless he should attain the age of twenty-one years, or die under that age leaving issue male. Upon an appeal to the House of Lords, a son of B.'s having in the meantime attained his majority, it was decreed that the leasehold estate vested absolutely in him; Lord Ellenborough and Lord Erskine, then Lord Chancellor, to this extent approving of the decree of Lord Loughborough, that the absolute interest did not vest in the *first tenant in tail, A.'s son, on his birth; [*26] but it was unnecessary to decide what was the proper limitation to have been inserted in the settlement, whether a limitation over on "dying under twenty-one," or on "dying under twenty-one without issue male." Lord Eldon, however, denying the distinction between wills and marriage articles, expressed some dissatisfaction with the decree, and stated that he could not reconcile the decision with *Vaughan v. Burslem*, (3 Bro. C. C. 101,) and *Foley v. Burnell*, (1 Bro. C. C. 274,) decided by Lord Thurlow, although he did not move an amendment. The cases, however, of *Vaughan v. Burslem* and *Foley v. Burnell* are cases of wills; and Lord Eldon himself afterwards, in *Jervoise v. Duke of Northumberland*, fully admitted the distinc-

tion between executory trusts in marriage articles and wills : see 1 J. & W. 574.

2. *As to Executory Trusts in Wills.*]—The intention of the testator must appear from the will itself, that he meant “heirs of the body,” or words of similar legal import, to be words of purchase ; otherwise Courts of equity will direct a settlement to be made according to the strict legal construction of those words. Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body, or words tantamount to heirs of the body ; as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although, as we have already seen in the case of marriage articles similarly worded, he would take only as tenant for life. Thus, in *Sweetapple v. Bindon*, 2 Vern. 536, B. by will gave 300*l.* to her daughter Mary, to be laid out by her executrix in lands and settled to the only use of her daughter Mary and her children, and if she died without issue the land to be equally divided between her brothers and sisters then living ; Lord Cowper said, that, had it been an immediate devise of land, Mary, the daughter, would have been, by the words of the will, tenant in tail ; and in the case of a voluntary devise the Court must take it as they found it, and not lessen the estate or benefit of the legatee ; although upon the like words in marriage articles it might be otherwise. See also *Legatt v. Sewell*, 2 Vern. 551 ; *Seale v. Seale*, 1 P. Wms. 290 ; *Harrison v. Naylor*, 2 Cox, 247 ; *Marshall v. Bousfield*, 2 Madd. 166 ; *Blackburn v. Stables*, 2 V. & B. 370 ; *Meure v. Meure*, 2 Atk. 266.

In the following cases, however, it has been held that there has been a sufficient indication of the testator’s intention, that the words “heirs of the body,” or words of similar import, should be considered as words of purchase and not of limitation, viz. where *trustees were directed to settle an estate upon A. and the heirs of his body, taking *special care in such* [*27] *settlement that it should not be in the power of A. to dock the entail of the estate given to him during his life* : *Leonard v. Earl of Sussex*, 2 Vern. 526. So, directions in a will that heirs of the body or issue shall take, “*in succession and priority of birth*,” or that the settlement shall be made “*as counsel shall advise*,” or “*as executors shall think fit*,” have been held strongly to indicate an intention that an estate should be settled strictly : see *White v. Carter*, 2 Eden, 368 ; *Bastard v. Proby*, 2 Cox, 6 ; *Rochfort v. Fitzmaurice*, 2 D. & W. 1 ; *Read v. Snell*, 2 Atk. 642. So, where a testator directed trustees to convey an estate to his daughter for her life, and so as she alone, or such person as she should appoint, should take or receive the rents and profits thereof, and so that her husband should not intermeddle therewith, and from and after her decease in trust for the heirs of her body for ever ; Lord Hardwicke, considering that it was plainly the intention of the testator that the husband should have no manner of benefit from the estate, either in the lifetime of his wife or after her decease, held, that the words “heirs of her body” were words of purchase, and that the wife was entitled to a life estate only ; for had they been construed as words of limitation, and the wife had taken as

tenant in tail, the husband, contrary to the intention of the testator, would have had considerable benefit from the estate as tenant by the curtesy : *Roberts v. Dixwell*, 1 Atk. 607 ; S. C. West's Rep. temp. Lord Hardwicke, 536 ; see also *Stonor v. Curwen*, 5 Sim. 264 ; *Parker v. Bolton*, 5 L. J. N. S. (Ch.) 98 ; *Shelton v. Watson*, 16 Sim. 542 ; *sed vide Samuel v. Samuel*, 14 L. J. N. S. (Ch.) 222. At the present day, under such words, a clause *against anticipation* would probably be added. See *Turner v. Sargent*, 17 Beav. 515, in which case a testator having directed that property should be settled upon his daughter, to the exclusion of her present or any future husband, that the same might belong to her during her life, "a settlement was directed in trust for the daughter for her life, to her separate use, without power of anticipation." *Stanley v. Jackman*, 5 W. R. 302, M. R.

So, where a testator, as in *Lord Glenorchy v. Bosville*, directs an estate to be conveyed to a person for life "*without impeachment of waste*," or to a person for life with a limitation to trustees "*to preserve contingent remainders*," he will be held sufficiently to have indicated his intention, that in a subsequent limitation to the issue or heirs of the body of the person to whom the life interest is given, such issue or heirs should take as purchasers, and a [*28] strict settlement will accordingly be directed : see **Papillon v. Voise*, 2 P. Wms. 571, in which case the distinction between executed and executory trusts in wills is most strikingly illustrated. There A. bequeathed a sum of money to trustees, in trust, to be laid out in a purchase of lands and to be settled on B. for life, *without impeachment of waste*, remainder to trustees and their heirs during the life of B. to *preserve contingent remainders*, remainder to the heirs of the body of B., remainder over, with power to B. to make a jointure ; and by the same will A. *devised lands* to B. for his life, *without impeachment of waste*, remainder to trustees and their heirs during the life of B. to *support contingent remainders*, remainder to the heirs of the body of B., remainder over ; though it was decreed at the Rolls that an estate for life only passed to B., with remainder to the heirs of his body by purchase, as well in the lands devised as in those directed to be purchased, yet, upon an appeal from this decree Lord Chancellor King declared as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this last remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty ; but as to the other point, he declared the Court had a power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate and where it was only executory, and the party must come to the Court in order to have the benefit of the will ; that in the latter case the intention should take place, and not the rules of law, so that as to the lands to be purchased they should be limited to B. for life, with power to B. to make a jointure, remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male successively, remainder over.

Where, however, the trusts and limitations of land to be purchased by trustees are expressly declared by the testator, it has been decided that the Court has no authority to make them different from what they would be at law. Thus, in *Austen v. Taylor*, 1 Eden, 361, land was devised to trustees in trust to pay an annuity; and subject thereto in trust for A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainder to the testator's right heirs: and the residue of the testator's personal estate was to be laid out in the purchase of lands which should thereafter remain, continue, and be, to, for, and upon such and the like estate or estates, *uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as [*29] were by him before devised, limited, and declared of and concerning his lands and premises last before devised, or as near thereto as might be and the deaths of persons would admit. Lord Northington distinguished the case from *Papillon v. Voice*, on the ground that the testator refers no settlement to his trustees to complete, but declares his own uses and trusts, which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; and he therefore held, that A. was entitled to an estate tail in the lands to be purchased; and see *East v. Twyford*, 9 Hare, 713, 733; see, however, *Meure v. Meure*, 2 Atk. 265; *Harrison v. Naylor*, 2 Cox, 247; *Green v. Stephens*, 17 Ves. 76; *Jervoise v. Duke of Northumberland*, 1 J. & W. 572.

The word "issue," as observed by Lord Talbot in *Lord Glenorchy v. Bosville*, is both a word of purchase and of limitation; but the word "heirs" is naturally a word of limitation. In executory trusts in wills, therefore, it will be seen, upon examining the cases, that where the word "issue" is made use of, Courts of equity will more readily decree a strict settlement, than where the words "heirs of the body" have been used. See *Meure v. Meure*, 2 Atk. 265; *Ashton v. Ashton*, (cited in *Bagshaw v. Spencer*,) 1 Coll. Jur. 402; *Horne v. Barton*, Coop. 257; *Dodson v. Hay*, 3 Bro. C. C. 405; *Stonor v. Curwen*, 5 Sim. 264.

Wherever in executory trusts, in wills, the words "heirs of the body," or "issue," are construed as words of purchase, they will be held to include daughters as well as sons, and the settlement, as in *Lord Glenorchy v. Bosville*, will be decreed to be made in default of sons and their issue upon daughters, as tenants in common in tail general, with cross remainders between them: *Bastard v. Proby*, 2 Cox, 6. In *Trevor v. Trevor*, 13 Sim. 108, where a testator devised his estates to trustees, in trust, to settle and convey the same to the use of or in trust for G. R., who had then no issue, for life, without impeachment of waste, with remainder to his issue in tail male in strict settlement, Sir L. Shadwell, V. C., held, that the estates ought to be settled upon G. R. for life, without impeachment of waste, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male. This decision was affirmed in the House of Lords: 1 H. L. Cas. 239. See also *Shelton v. Watson*, 16 Sim. 543.

In *Turner v. Sargent*, 17 Beav. 515, the testator, after directing a settle-

ment to be made of real and personal property upon his daughter for life, [*30] added, that it *was "to be secured for the benefit of her children, if more than one, equally, after her death, so that the issue of any such child dying in his daughter's lifetime might take his or her parent's share, and in default of such children or other issue, then to his son W. absolutely. Sir J. Romilly, M. R., directed a settlement to be made, according to which, after the decease of the daughter, the property was to be in trust for her children; but if any child died in her lifetime, leaving children or remoter issue who should be living at her death, such children or remoter issue should take the share of the child of the testator's daughter so dying, *per stirpes*, but *inter se*, as tenants in common, with limitations in the nature of cross remainders in favor of the children and issue who should survive the testator's daughter, as respected the share of any child dying in her lifetime without leaving issue, and as respected the share of any issue dying in her lifetime. And if no child of the testator's daughter or issue of any deceased child should be living at her decease, there was to be an ultimate trust for W., so that the death of the testator's daughter was the period or event at which the vesting of the property in the children's issue, or in the legatee and devisee over, was to be ascertained.

Whenever a strict settlement is decreed, limitations to trustees to preserve contingent remainders will, if necessary, be inserted; *Stamford v. Hobart*, 3 Bro. P. C. 31, Toml. ed., 1 Atk. 593; *Baskerville v. Baskerville*, 2 Atk. 279; *Harrison v. Naylor*, 2 Cox, 247; but since the passing of 8 & 9 Vict. c. 106, such limitations are in some cases unnecessary, see sect. 8; and sometimes the freehold will be vested in trustees, during the life of the tenant for life: *Woolmore v. Burrows*, 1 Sim. 512.

For the manner in which a direction to *entail* real and personal estate will be carried into effect, see *Tennent v. Tennent*, 1 Dru. 161; *Jervoise v. Duke of Northumberland*, 1 J. & W. 559; as to an entail directed to be made of land in Scotland, *Graham v. Stewart*, 2 Macq. H. L. Cas. 295; and as to the settlement to be made when estates are directed, as far as the law will permit, to be strictly settled so as to go with an ancient barony, see *Banks v. Le Despencer*, 10 Sim. 577, 11 Sim. 508.

Where real and personal property were by will directed to be settled upon the same trusts, the Court did not think itself authorized, through the medium of a trust for sale, to settle the real estate as personalty: *Turner v. Sargent*, 17 Beav. 515, 520.

As to the construction which will be put upon the word "family," in cases of executory trusts in a will, see *White v. Briggs*, 2 Ph. 583. There a testator directed that after the death of his wife (to whom he gave a life interest [*31] in all his property both real and personal,) his *nephew, C. W., should "be considered heir to all his property not otherwise disposed of," and added that "having had little intercourse with him, and being apprehensive that his habits required some control, he directed that whatever portion of his property might thereafter be possessed by him, should be secured by his executors for the benefit of his family;" and he "urged upon his executors to

consider it an indispensable obligation to secure his estate in the nature of a trusteeship for the parties who might be interested thereafter." It was held by Lord Cottenham, C., that the real estate should be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; and that the personal estate should be settled upon the nephew for life, with remainder to all his children as joint tenants, with a proviso, that, in the event of all the children dying under twenty-one, and in the case of daughters unmarried, and in the case of sons without lawful issue, the personalty should be held in trust for the nephew absolutely.

Chattels directed by will to go in strict Settlement.—Where chattels are given by will, and are directed, by reference to limitations of real estate in strict settlement, to go as heirlooms, "as far as the rules of law and equity will permit," Courts of equity will not construe the will so as to prevent their vesting absolutely in the first tenant in tail upon his birth, although, as we have seen in the case of marriage articles, a clause would be inserted in the settlement, which would prevent their vesting absolutely, unless the tenant in tail attained twenty-one years of age, or died under that age leaving issue. See *Foley v. Burnell*, 1 Bro. C. C. 274; *Vaughan v. Burslem*, 3 Bro. C. C. 101; *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387; *Carr v. Lord Erroll*, 14 Ves. 228; *Rowland v. Morgan*, 6 Hare, 463; affirmed on appeal, 2 Ph. 764, overruling *Gower v. Grosvenor*, Barn. Ch. Rep. 54; S. C., 5 Madd. 337; *Trafford v. Trafford*, 3 Atk. 347. See also *Doncaster v. Doncaster*, 3 K. & J. 26; *Evans v. Evans*, 17 Sim. 108; *Stapleton v. Stapleton*, 2 Sim. N. S. 212; and *Tollemache v. Coventry*, 2 C. & F. 611; S. C., 8 Bligh, N. S. 547, overruling *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232. If, however, a plain intention be expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the Court must execute that intention: *Potts v. Potts*, 3 J. & L. 353; 1 H. L. Cas. 671. See also *Trafford v. Trafford*, 3 Atk. 347.

Doctrine of cy-pres, as applicable to executory trusts.—Where an executory trust, if carried literally into effect, would be void for *illegality, as where it would infringe the rule against perpetuities, the Court, in [*32] order to carry the testator's intention into effect as far as possible, or, as it is termed, cy-pres, will direct a settlement to be made as strictly as the law will permit. Thus, in *Humberston v. Humberston*, (1 P. Wms. 332; S. C., 2 Vern. 737; Prec. Ch. 455,) where there was a devise to a corporation in trust to convey to A. for life, and afterwards, upon the death of A., to his first son for life, and so to the first son of that first son for life, with remainder, in default of issue male of A., to B. for life, and to his sons and their sons in the same manner; Lord Cowper said, that though the attempt to create a perpetuity was vain, yet, so far as was consistent with the rules of law, it ought to be complied with; and he directed that all the sons already born should take estates for life, with limitations to their unborn sons in tail. See *Williams v. Teale*, 6 Hare, 239, and cases there cited; *Lyddon v. Ellison*, 19 Beav. 565,

573; *Peard v. Kekewich*, 15 Beav. 173; see, however, *Blagrove v. Hancock*, 16 Sim. 371.

As to what powers will be inserted in settlements directed to be made by the Court.—Where in marriage articles or a will, a settlement is directed to be made with the *usual powers* or *proper powers*, a Court of equity will order to be inserted in the settlement powers of leasing for twenty-one years, (*Hill v. Hill*, 6 Sim. 145; *Duke of Bedford v. Marquis of Abercorn*, 1 My. & Cr. 12;) powers to grant building or mining leases where the property is fit for those purposes, (*Hill v. Hill*, 6 Sim. 145;) powers of sale and exchange (*Hill v. Hill*, 6 Sim. 136; *Peake v. Penlington*, 2 V. & B. 311; *Williams v. Carter*, Sug. Pow., App. 22, 7th edit. See, however, *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 439;) powers of partition where there is any joint property, (*Hill v. Hill*, 6 Sim. 145;) powers of appointing new trustees, (*Lindow v. Fleetwood*, 6 Sim. 152; *Sampayo v. Gould*, 12 Sim. 426;) but not a power to raise portions, (*Higginson v. Barneby*, 2 S. & S. 518;) nor to jointure a future wife, (*Duke of Bedford v. Marquis of Abercorn*, 1 My. & C. 312.)

In considering these cases, it ought to be remembered that there is a palpable distinction between powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, or to raise money for any particular purpose. But powers of leasing, of sale, and exchange, and (where there is any joint property, or there are any mines or any land fit for building purposes,) powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates, *and such powers are beneficial to all parties :
[*33] *Hill v. Hill*, 6 Sim. 145.

But where certain powers are specifically mentioned, the expression *usual powers*, coming afterwards will be considerably narrowed: *Pearse v. Baron*, Jac. 158; *Hill v. Hill*, 6 Sim. 141; *Brewster v. Angell*, 1 J. & W. 625; *Horne v. Barton*, Jac. 439; unless it is contained in a separate and distinct sentence: *Lindow v. Fleetwood*, 6 Sim. 152. A power of varying securities is analogous to a power of sale and exchange; so that where real estate was covenanted to be settled upon the same trusts, and with the like powers, as stock settled upon trusts, with power of varying securities, a power of sale and exchange of the real estate was inserted in the settlement: *Williams v. Carter*, 2 Sug. Pow., app. 22, 7th ed.; *Horne v. Barton*, Jac. 440.

But where no direction as to the insertion of powers is given, a Court of equity will not, in the absence of any expression from which the intention to include any powers may be inferred, authorize their introduction into a settlement: *Wheate v. Hall*, 17 Ves. 85; *Brewster v. Angell*, 1 J. & W. 628; except perhaps a power of leasing. See *Woolmore v. Burrows*, 1 Sim. 518; but in that case the property was in Ireland.

In a recent case, however, where a testator by his will directed a settlement of real and personal property to be made, but gave no direction as to powers, Sir John Romilly, M. R., was of opinion that the testator by simply directing

a settlement, ought to be held to have intended all the *usual* powers to be included. That the settlement, therefore, ought to contain the usual powers of leasing, sale and exchange, and for the appointment of new trustees, together with a receipt clause, and provisions for maintenance, education, and advancement for the children or issue living at the death of the tenant for life, during their minority: *Turner v. Sargent*, 17 Beav. 515; see also *Byam v. Byam*, 19 Beav. 58.

Where a testator had directed, that in the event of the marriage of his daughter, a certain portion of his property should be secured to her, and the issue of her marriage, by a settlement or some other good assurance, in such manner as his trustees or trustee for the time being might think fit, the Court on an application to which the surviving trustee was a party, approved of a power in the settlement made on the marriage of the daughter, enabling her to appoint by will a life estate in the property to her husband. *Charlton v. Rendall*, 11 Hare, 296.

It should be remembered that the Court of Chancery can now, under 19 & 20 Vict. c. 120, authorize leases and sales of settled estates, and give general powers of leasing to trustees of settlement in cases in which formerly it would have been necessary to have made an application to parliament.

Rectification of settlement.—If a settlement directed to be made by a testator is improperly framed, it may, as in *Lord Glenorchy v. Bosville*, be rectified by the will; but, with regard to a settlement agreed to be made by articles, if both articles and settlement are made *before* marriage, the settlement will not in general be controlled by the articles, because, as observed by Lord Talbot in the principal case of *Legg v. Goldwire*, “when all parties are at liberty, the settlement will be taken as a new agreement.” Evidence is however admissible, to show that the articles constituted the final agreement between the parties, and that the discrepancy between the articles and settlement arose from mistake, and upon this being proved the Court will rectify the settlement, and make it conformable to the real intention of the parties: *Bold v. Hutchinson*, 5 De G. Mac. & G. 558, 568; but “in order to justify the Court in taking such a course, it is obvious that a *clear* intention must be proved; it must be shown that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words:” per Lord Cottenham, C., in *the Marquess of Breadalbane v. the Marquess of Chandos*, 2 My. & Cr. 739. As to cases where the Court has rectified settlements, see *Hamil v. White*, 3 J. & L. 695; *Wilson v. Wilson*, 15 Sim. 487, 1 H. L. Ca. 538; *Walsh v. Trevannion*, 16 Sim. 178; *Murray v. Parker*, 19 Beav. 305; in re *Morse’s Settlement*, 21 Beav. 174; *Torre v. Torre*, 1 Sm. & G. 518; *Walker v. Armstrong*, 21 Beav. 284; *Naylor v. Wright*, 5 W. R. 770, V. C. S. Where it has refused to do so, see *Howkins v. Jackson*, 2 Mac. & G. 372; *White v. Anderson*, 1 Ir. Ch. Rep. 419; *Brougham v. Squire*, 1 Drew. 151; *Lloyd v. Cocker*, 19 Beav. 140; *Fyfe v. Arbuthnot*, 5 W. R. 793, L. C.

Where, however, the settlement, *though made before marriage*, is expressly mentioned to be made *in pursuance or in performance of the marriage articles*, the settlement will be rectified by them, and it will not be necessary to resort to evidence: *West v. Errissey*, 2 P. Wms. 349; 3 Bro. P. C. 327; *Bold v. Hutchinson*, 5 De G. Mac. & G. 568.

Where the settlement is made *after marriage*, it will in all cases, whether it is mentioned to be made in pursuance or performance of articles or not, be controlled and rectified by them. These distinctions as to rectifying settlements by articles, (subject to the qualifications laid down by Lord Cranworth, C., in *Bold v. Hutchinson*, 5 De G. Mac. & G. 558, 568,) are well stated by Lord Talbot in *Legg v. Goldwire*: see also *Honor v. Honor*, 2 P. Wms. 123; [*35] *Roberts v. Kingsley*, *1 Ves. 238; *Streatfield v. Streatfield*, Ca. t. Talb. 176; *Warwick v. Warwick*, 3 Atk. 293.

Courts of equity will not decree a settlement as against purchasers for valuable consideration, (amongst whom mortgagees are included,) without notice of the articles: *West v. Errissey*, 2 P. Wms. 349; *Powell v. Price*, 2 P. Wms. 535; *Warwick v. Warwick*, 3 Atk. 291. A settlement, however, will be decreed against purchasers with notice of the articles. Thus, in *Davies v. Davies*, 4 Beav. 54, J. D., by marriage articles, covenanted to settle an estate to the only proper use and behoof of himself, and after his decease to the use and behoof of the heirs of the said J. D. begotten or to be lawfully begotten on the body of E. D., and for want of such issue to the right heirs and assigns of the said J. D. for ever. J. D. afterwards, without having executed any settlement, mortgaged the estate by demise, and he and his wife levied a fine. The articles were handed over to the mortgagee. It was contended for the mortgagee, upon the authority of Lord Northington, in *Cordwell v. Mackrill*, 2 Eden, 344, that he was not bound to take notice of an equity arising out of the mere construction of words which were uncertain, and that the mortgagee might well suppose that the mortgagor was entitled to charge the estate. *Cusack v. Cusack*, (5 Bro. P. C. 116, Toml. ed.) and *White v. Thornborough* (2 Vern. 702,) were also cited. However, Lord Langdale, M. R., held, that the possession of the articles gave to the mortgagee a sufficient notice of the title of the plaintiff, the eldest son of the marriage, as the articles showed a clear and distinct intention of benefiting the issue of the marriage, which could not have misled an unprofessional person, and decreed the estate to be conveyed to the son as tenant in tail, discharged of the mortgage, with costs. *Cordwell v. Mackrill* may, therefore, be considered as overruled by *Davies v. Davies*: see also *Thompson v. Simpson*, 1 D. & W. 491, where Sir Edward Sugden, L. C. of Ireland, observes, "*Cordwell v. Mackrill* is a case of no great authority, though decided by a great judge. . . . It seems to me that where, upon the whole of the articles, it is plain what construction the Court would have put upon them, had it been called to execute them about the time they were made, they should be enforced, however difficult the construction may be, even as against a purchaser with notice; but not after a lapse of time, where there is anything so equivocal or ambiguous in them as to render it

doubtful how they ought to be effectuated." See also *Abbot v. Geraghty*, 4 Ir. Ch. Rep. 15, 24, 25.

It may here be mentioned, that a settlement will sometimes be rectified by a decree merely, without the parties being put to the expense of a fresh deed; *Tebbitt v. Tebbit*, 1 De G. & Sm. 506.

The distinction illustrated in the principal case, between executed and executory trusts, is well settled in this country, in its connexion with the rule in *Shelley's case*. The American courts, however, have never undertaken to decree a strict settlement, upon a mere general intention, in marriage articles or executory trusts, to make provision for children. But the distinction between executed and executory trusts, here, has gone to the extent of arresting the application of the rule in *Shelley's case*, in regard to executory trusts, and causing the person answering the description of issue, heirs of the body, or heirs, to take as purchasers, according to the language of the will as it stands. For this purpose, a trust will, in the American courts, be considered as executory, whenever a conveyance is to be made by the trustees, or, in case of personal property, whenever a delivery is to be made by the trustees at successive periods of time to the persons respectively entitled under the will or articles: and the rule in regard to such executory trusts is, that wherever the intention appears to be that the first taker should have only an estate for life, the remaindermen will take as purchasers, unless there be something else in the instrument to control that construction. *Saunders v. Edwards*, 2 Jones, Eq. 134.

And upon this point, the observa-

tion in the preceeding note, after the title *As to Executory Trusts in Wills*, that under "a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body, or words tantamount to heirs of the body," A. will take an estate tail, does not appear to be consistent with the views prevailing in the courts of this country, nor is it indeed a quite accurate expression of the result of the English cases immediately thereafter referred to. In all those cases, there was in the will a specific intent to give an estate tail to the first taker; at least, the directions of the testator were in language which, according to ordinary legal construction, made an estate tail, and there was nothing to indicate another intention. The difference between executory trusts in wills and in marriage articles, as far as it is shown by those cases, is, that in the latter, the purpose of the settlement, which principally is to secure an independent estate to the children, will control language in the articles, which else would be construed to give an estate tail to the parents; but in wills, if the language according to its legal construction, import an estate tail in the parents, this cannot be over-borne by any presumed design to benefit the children. In *Sweetapple v. Bindon*, 2 Vern. 536, money was by will directed to be laid out in land and settled to the only use of the testatrix's

"daughter M. and her children," and if she died without issue, then over: this of course was a direction to create an estate tail in the daughter: but the court said, that upon marriage articles, where it appeared that the estate was intended to be preserved for the benefit of the issue, it might have been otherwise. *Legatt v. Sewell*, reported 2 Vern. 551; 1 P. Wms. 87; but most accurately and intelligibly in 1 Eq. Ca. Abr. 394, pl. 7; was not a construction upon an executory but upon an executed trust. The first taker under the will, had upon a bill to which the ultimate remainderman was not a party, obtained a decree that the estate should be settled according to the direction in the will; the construction afterwards again coming in question, the Lord Keeper said, "There having been a Decree already in this case, it must depend on what it is at Law;" and he referred it to the Judges of the C. B. as a question upon an executed settlement, and three of them certified that an estate tail had been created; See *Trevor v. Trevor*, 1 Eq. Ca. Abr. 387, 390. In *Seale v. Seale*, 1 P. Wms. 290, money was directed to be laid out in lands and settled on "A. and the heirs male of his body," which of course was a direction for an estate tail in A.: and upon its being contended that it was like marriage articles under which a strict settlement would be decreed, the Lord Chancellor said "this case differed; for that in marriage articles the children are considered as purchasers; but in the case of a will, (as this was) where the testator expressed his intent to give an estate tail, a Court of Equity ought not to abridge the bounty directed by the

testator." In *Harrison v. Naylor*, 2 Cox, 247, a testator directed lands to be bought, and then devised the lands when purchased "to his son T. N. to him and the heirs male of his body forever;" which was creating an estate tail as clearly as possible. In *Marshall v. Bousfield*, 2 Madd. 166, the testator directed that his estate "should be settled by able counsel, and go to and amongst his grandchildren of the male kind, and their issue in tail male;" and the Vice Chancellor said that as there was no language used in the will which indicated an intention to give only an estate for life to the grandchildren, and as there was no way of giving an estate in tail male to the issue of the grandchildren (one of the latter having been born after the testator's death,) but by giving an estate tail male to the grandchildren which unless barred would descend on their issue, such an estate in the grandchildren was a plain construction of the will, and was the only way in which that executory trust could be carried into execution. In *Blackburn v. Stables*, 2 V. & B. 367, a testator devised all his property to his executors in trust for his great nephew, but directed that they should not give up their trust, "till a proper entail be made to the male heir by him:" here the great nephew was the specific object of the testator's bounty, and the direction was to entail the estate given to him, upon his heir male; the Master of the Rolls said, that as no express estate for life was given to the first taker, no clause that his estate should be without impeachment of waste, no direction to frame the limitation so as to deprive him of the power of barring the en-

tail, nothing in the context of the will to show that the words were not to be taken in their legal acceptation, the great nephew was entitled to have a conveyance made to him in tail male. *Meure v. Meure*, 2 Atk. 265, was a case in which a trust was to be settled on one for life "and after his decease, then in trust for the use of the issue of the body of the plaintiff lawfully begotten:" and the Master of the Rolls said, "Where lands are to be settled to one for life, and to the heirs of his body, there is no case where such a limitation has not been held to be an estate tail; on the other hand, there is no case where it is to be settled to one for life, and after his death to the issue of his body, that such a limitation has been construed an estate tail;" now, although a principal part of this distinction is between "heirs" and "issue," yet a substantive part of it also consists in the presence of the clause "after his death" in the latter case; and so far, the case of *Meure v. Meure* is opposed to the observation above cited from the preceding note. — Upon the whole, there does not appear to be authority in the English cases for inferring that a devise "in trust to convey to A. for life, and after his decease to the heirs of his body," does not indicate an intention that the issue of A. should take as purchasers, and does not prevent an estate tail from vesting in A. In this country, it is believed, that an executory trust in those words or equivalent words, or in any words that limit an estate to the first taker for life only, with a remainder to heirs or heirs of the body, will not be an estate of inheritance in the first taker, but an estate

for life only, with a remainder to heirs or heirs of the body as purchasers.

In New York, where, previously to the operation of the Revised Statutes, (1 R. S. 725, § 28,) viz. to January 1, 1830, the rule in *Shelley's case* was recognized as a binding rule of law, in regard both to wills and deeds; (*Brant v. Gelston*, 2 Jo. Ca. 384; *Kingsland v. Rapelye*, 3 Edwards, 2; *Schoonmaker v. Sheeley*, 3 Hill's N. Y. 165; subject to the qualifications settled by the English cases; *Rogers v. Rogers*, 3 Wendell, 503; *Tanner v. Livingston*, 12 Id. 83;) the distinction between executory trusts and executed trusts had been established in *Wood v. Burnham*, 6 Paige, 514: S. C. on appeal, 26 Wendell, 9. This case came before the Chancellor upon appeal from a decree of the Vice-Chancellor which adjudged that the children of the testator, living at the time appointed for the division of his residuary estate, took only estates for life, and that the remainders in fee belonged to those persons; who at the death of the first takers, respectively answered the description of their heirs at law. The trust declared by the will, as to this residuary estate, was, among other things, to receive the rents, profits, and income thereof for the first six years after the testator's death, and divide the same among his children and the issue of such of them as should have died leaving issue, *per stirpes*; and upon the further trust, at the expiration of the six years, to convert the personal estate, and the real estate which had been sold, into stocks; and thereupon to divide such stocks and the real estate remaining unsold into so many shares as there should be children of the testator then

alive, and as should have died leaving lawful issue then living. And after having made such division, the executors or trustees were directed to convey by a fit and competent deed or instrument in writing, one share to each of the surviving children and one other share to the lawful issue of each child so deceased leaving issue then living. This executory clause then concluded as follows: "And in each deed or writing executed to any of my children shall be inserted and expressed a clause limiting such grant or interest conveyed to the grantee for life, with remainder over to the right heirs of such grantee, their heirs and assigns forever." The testator died previously to the abrogation of the rule in *Shelley's case*, by the Revised Statutes. The Chancellor declared that the rule in *Shelley's case*, was unquestionably the law of the state before those statutes took effect; but that "the devise to the executors in this case being an executory and not an executed trust, or, in the language of one of the English Chancellors, the testator having directed his executors to make conveyances of the estate to the *cestuis que trust* instead of being his own conveyancer by vesting either a legal or equitable estate in his children and their heirs directly, it forms an exception to the rule in *Shelley's case*: And this court will direct the conveyances to be made in such a manner as to carry into effect the intention of the testator, notwithstanding the rule." He then reviewed the English cases which established this difference between executed and executory trusts, and concluded as follows. "The principle therefore must be considered as settled, that wherever there is an executory trust to be car-

ried into effect by a conveyance from the trustees, if it is apparent from the instrument creating the trust that the testator or donor intended that the first taker should have a life estate only, and that his heirs should take the remainder in fee as purchasers, this court will direct such a conveyance to be made as will most effectually carry into effect such intention, so far as it can be done consistently with legal rules. In the present case, from an examination of the provisions of the will, I think there cannot be any doubt that it was the intention of the testator that his children who should be living at the expiration of the six years should take an estate for life only in their respective shares, and that their heirs should take the remainder in fee as purchasers. It is impossible to conceive what other object the testator could have had in giving such a positive direction to his executors to insert a clause in the deed limiting the estate in terms to the children of the testator for their respective lives. The decision of the Vice Chancellor was therefore correct." Upon appeal to the Court of Errors, this decree of the Chancellor was unanimously affirmed; *Tallman v. Wood*, 26 Wendell, 9.

The same principles and distinctions have been accurately defined and established, after great discussion, in Georgia. It is there settled, that the rule in *Shelley's case* is a permanent and inflexible rule of property; *Choice v. Marshall*, 1 Kelly, 97; but that it does not apply to executory trusts, though it does to executed trusts; *Edmondson and Wife v. Dyson*, 2 Id. 307; *Wiley, Parish & Co. and others v. Smith and another*, 3 Id. 551, 559, 560: and the distinction between the

two classes of trust is, in the two latter decisions, stated with great clearness. In *Edmondson and Wife v. Dyson*, Mrs. R. by will devised and bequeathed her whole estate to D. in trust, for the sole and exclusive use of her husband during his natural life, and directed that at his death the trustee should convey the property so bequeathed in trust, to such person absolutely as the husband should by will appoint, and if he should die intestate, then, that the trustee should convey all the property to the heir or heirs at law of the husband absolutely; and the trustee was further authorized with the husband's consent to sell all or any part of the property, at such time and on such terms as he might think best, and to invest the proceeds in such manner as he might think most to the interest of the husband, first having the latter's consent. The husband died intestate, and the question arose in this case, whether the child of the husband took as a purchaser under Mrs. R.'s will, or whether the whole estate vested in the husband, and his child took as his heir in the regular course of law. The case was admitted to depend entirely upon the question whether the trust was executory or executed. The judge of the Superior Court, below, held it to be executed, and within the rule in *Shelley's case*; but upon appeal to the Supreme Court, it was adjudged to be executory, on the ground that a conveyance was to be made by the trustee, and therefore without the rule. Mr. Justice Nisbet, in an able opinion, in giving judgment on the appeal, declared the rule in *Shelley's case* to be an established principle of law in that state, and explained the grounds of it; and that it applies

equally to real and to personal property; but that it "applies to *legal estates*, and to *executed trusts*, and does not apply to *trusts executory*, where the testator plainly intimates an intention that it shall not apply;" that the inference of equity in case of marriage articles and *executory trusts* proceeds upon the same ground; and that executory trusts are where something is left to be done, some conveyance thereafter to be made. "This *something to be done*," said Mr. Justice Nisbet, "is the grand criterion for a correct determination whether a trust is, or is not, executory. What those things are which the testator leaves to be done and the effect of them, are the pivots upon which this discussion turns. It is argued with great force, that if the *limitations are perfect*, if the *character of the estates is ascertained*, the trust is executed. That the something *left to be done* has no reference to any mere act of conveyancing which might be necessary to effectuate limitations which the testator has fully declared, but that the trust is executory only where the limitations themselves are not defined, where the estates are not ascertained, and in cases where the testator only leaves loose statements, or notes of his intention, requiring careful and responsible deeds, or other instruments, to be by the trustee executed, which in themselves create and define estates, or which require a decree of chancery to mould the estates according to such loose memoranda. That it is immaterial whether the limitations are legal or equitable; that is, whether the estate in the devisee may be asserted at law, or a decree in chancery be necessary to its perfect enjoyment, if the limitations are com-

plete, and there is no doubt about the quantity or quality of the estate. I do not deny, but upon principle, it is hard to escape from the conclusiveness of this reasoning. It is difficult to see any reason why an estate to A. in trust for B. for life, with remainder to the heirs of B. is an *executed trust*, and an estate to A. in trust for B. for life with remainder in fee, to be conveyed to the heirs of B. is an *executory trust*. In both cases the intention of the testator is the same, the estates limited are the same. The only difference is found in the fact that in the first case the testator is his own conveyancer, and the heirs take directly, and in the second he makes his trustee his conveyancer, and the heirs take through his deed. The thing to be done in the last case, to wit, convey, neither restricts nor enlarges the estate to the heirs. And yet the authorities, as we shall see, make this very act of *conveying*, the test, or one of the principal tests, of an executory trust. . . . I should remark as explanatory of some of the authorities, that the rule settled is the same, whether the act to be done is directed to be done by the trustee, or is left to a court of Chancery. To this intent, the agency of the court and of the trustee is the same. And this is a convenient place to remark, that if the property in this case had been left in trust to D. to the husband for life, and remainder in fee to his heirs at law, there could be no doubt about its then being an *executed trust*, and the rule in *Shelley's case*, would apply to and control it. But such are not the terms of limitation; the property is left in trust with D. to be conveyed to the heirs at law of the husband. Now here is

something left to be done by the trustee, and *that something is a conveyance*, which brings the case to that direct test to which I have before referred, to wit, the rule in *Shelley's case* not being applicable to executory trusts; and whether a trust be executed or executory, depending upon something being left to be done by the trustee, and that thing to be done, being in this case, a conveyance; does the direction to convey make this an *executory trust*? I have not found in the laborious investigation which I have been compelled to give this subject, a single case where a conveyance was required to be made, however merely formal it might appear to be, which has been determined to be an executed trust." He then reviews the English cases on executory trusts, and concludes; "From all of which it appears to me manifest, that courts of equity, whether with or without sufficient foundation for the act in principle, will take to themselves jurisdiction in case of wills, from the fact that the testator has directed a conveyance to be made by a trustee; will from that fact declare a trust *executory* in contradistinction to *executed*; will defeat in such a case the rule in *Shelley's case* in favor of the intention of the testator, by decreeing a conveyance in pursuance of his intention." In the case of *Wiley, Parish & Co. v. Smith and another*, 3 Kelly, 551, 560, the same distinction is explained; and it is decided that a devise to one in trust for another and his children without any conveyance being required to be made or act to be done by the trustee, is an executed trust.

The same distinctions are established under the decisions of Tennessee. In

that State the rule in *Shelley's case*, after great discussion and consideration, was deliberately approved, as a principle of law to which full effect should be given; *Polk and others v. Faris*, 9 Yerger, 210: though it is subject to the qualification that if the remainder is limited by will to "children," or to "heirs," obviously in the sense of children, the remaindermen may take as purchasers; *Hughes v. Cannon*, 2 Humphreys, 589; *Evans v. Wells*, 7 Id. 559; but that executory trusts are not within the rule, had been decided in *Loving and others v. Hunter*, 8 Yerger, 4, 30. In that case, the testator directed that his "land be sold for the best price that can be got, and the money, arising therefrom, to be laid out in young negroes, at the discretion of my executors;" and "lent" two-thirds of the estate "unto his three daughters, to them, during their natural lives, and then given to the lawfully begotten heirs of their bodies;" and the other third, which he had previously "lent" to his wife, "I desire (he said) may be equally divided, after her decease, among my three daughters, to them lent, during their lives, and then given to the lawfully begotten heirs of their bodies forever." The Court held, in the first place, that "lent" for life, and "given" to the heirs of the body, made the former limitation a trust only, and the latter a legal estate, so that the rule did not apply; and in the next place, that the direction that the land should be sold and laid out in young negroes at the discretion of his executors, contemplated the title to the negroes to be vested in the executors, and subject to trusts to be executed by them. "The idea

conveyed by this language (above cited) is," said the court, "that the executors, in whom is vested the title to the negroes, are so to provide, that the daughters of the testator are to enjoy the use of the property during their natural lives, and then, at their death, the executors are to give the estate to those who may then be heirs of the bodies of his daughters. . . . He uses the words (in regard to one of the thirds) "to them lent," to express his wish and desire, that the executors, when the event contemplated may occur, shall lend to the daughters during their lives; and when they die, "then," the executors are to give to the heirs. In this view of the case, the word, "then," has its full meaning and significancy, as referring to a gift then to be made by the executors. Thus understood, we see why the word "given" was used, instead of the word give. The language used is equivalent to the phrase, and "then to be given;" not giving directly himself, but vesting the estate in the executor, who is empowered to lend, and give, as directed in the will. If this be the meaning of the will, and we think it is, it will be at once perceived, that the rule in *Shelley's case*, can have no application here (it being merely an executory trust) and that a daughter took only an interest for life; and after her death her children were entitled to the property."—But executed trusts are completely within the operation of the rule in *Shelley's case*; and where marriage articles are excepted out of the rule, it is only on the ground of the settlement being executory; and therefore, if the trusts in such articles or contracts are executed, a contract in contemplation of

marriage is as much within the rule in *Shelley's case* as any other instrument is; as was decided in *Carroll v. Renick et al.*, 7 Smedes & Marshall, 799, a case upon a marriage contract executed in Tennessee by residents there, and determined under the decisions in that State. There, by a contract before marriage, personal property had been conveyed to a trustee, to hold subject to the following limitations and trusts, viz., "from and after the solemnization of said marriage to the use and behoof of said (intended wife,) for and during the term of her natural life, and at her death to the heirs of her body and their heirs forever, and if she should die without such heirs, or having such heirs, and they should die before they arrived at mature age, then to her brothers by her mother's side, their heirs and assigns forever. To the application of the rule in *Shelley's case*, upon the authority of *Polk and others v. Faris*, for the purpose of vesting the absolute property in the wife, it was objected that the case was under a marriage agreement. "The answer to this," said Mr. Justice Clayton, in pronouncing judgment, "is, that marriage agreements already executed, are subject to the same rules, with limitations contained in these instruments. It is only in cases of marriage articles, where the settlement is thereafter to be made, and the trusts are *executory*, that an exception to the general rule is permitted. In the case before us, the settlement was executed before the marriage, and there is no room for the exception."

The rule in *Shelley's case*, with its usual limitations, is received in South Carolina; *Dott v. Cunningham*, 1 Bay, 453; *Carr v. Porter*, 1 Mc'Cord's

Chancery, 60, 81; *Williams v. Caston*, 1 Strobbart, 130; *Williams v. Foster*, 3 Hill's So. Car. 193: and where a testator bequeathed personal property in these words, "I lend my daughters P. S. and A. H., each four negroes during their natural lives, and then to the heirs of their bodies," and appointed two persons executors of his will "in trust for the intents and purposes therein contained," it was held that this was not such an executory trust as prevented the operation of the rule in *Shelley's case*; and therefore that the daughter took the absolute property in the negroes; *Hinson and Wife v. Pickett*, 1 Hill's Chancery, 35. But in *Garner v. Executors of Garner*, 1 Dessausure, 437, the distinction between executory and executed trusts in the case of a marriage settlement was fully established. In that case it was agreed by a settlement before marriage that trustees should hold certain negroes in trust, that the husband should receive for life the rents and profits of their hire and labor, and then that the wife should receive the profits during her life, and then, upon the trust that the trustees would deliver up the said negroes and their increase, to the heirs of the body of the wife. It was contended that if this had been a settlement of real estate, the remainder to the heirs of the body would have united with the estate for life and given the husband an estate tail, but being of personal estate, that he took the absolute property. The Court, however, said, that marriage settlements were different from trusts under wills, because the former were on valuable consideration, and were to be carried into execution even against the parents, and if they were to put the

children completely in the power of the parents, there would be no object at all in the marriage settlements; provision for the issue being the immediate object of settlement, and intended as an effectual provision. "The intent is plain," said the Court: "The trust is executed as to the husband and wife; executory as to the children. The act to be done by the trustees was to deliver them to the children of the wife. This shows clearly that the husband and wife were to have only an usufructuary interest, and the property to be absolutely secured to the children." It was held accordingly, that the husband took an estate for life, with remainder to the wife for life, and that the limitation over to the heirs of the body of the wife, vested the property in them at her death. "Cases of marriage settlements," said the Court, "are different from estates at law, or mere trust estates, which follow the law." The principle that executory trusts are not within the rule in *Shelley's case*, was again enforced in *Porter v. Doby*, 2 Richardson's Equity, 49; where real and personal property was by will directed to be placed in the hands of a trustee, upon trust to apply the proceeds to the maintenance of the testator's children, during their natural lives, and after the death of one of them, to his heirs forever; and if the other should survive, the trustee was to keep a sufficiency for that one's support, and dispose of the rest as before mentioned. "The test of an executory trust," said Johnson, Ch., "is, that the trustee has some duty to perform, for the performance of which, it is necessary that the title be regarded as abiding in him. Here, nothing can be plainer than that the

trustee could not perform the trusts conferred on him without retaining the title and property."

In some other states, there are dicta recognizing the distinction between executory trusts in marriage articles and wills, and executed trusts; *Hornner v. Lyeth*, 4 Harris & Johnson, 431, 434; *Lessee of Findlay v. Riddle*, 3 Binney, 139, 152.

The reader desirous to follow the views prevailing in the different courts in this country, upon the application of the rule in *Shelley's case*, may consult the following cases, in addition to those above cited; *Bishop v. Selleck*, 1 Day, 299; *Goodrick v. Lambert*, 10 Connecticut, 448; *M'Feely's Lessee v. Moore's Heirs*, 5 Ohio, 464; *King's Heirs v. King's Administrator*, 12 Id. 390; reversed on Bill of Review, in *King v. Beck*, 15 Id. 559; *Roy and others v. Garnett*, 2 Washington, 9; *Smith v. Chapman*, 1 Hening & Munford, 240; *Warners v. Mason and wife*, 5 Munford, 242; *Bradley v. Mosby*, 3 Call, 50; *Bramble v. Billups*, 4 Leigh, 90; *Pryor v. Duncan et als.*, 6 Grattan, 27; *Den d. Stith's Heirs v. Barnes*, 1 Carolina Law Repository, 484; *Williams and wife v. Holly*, 2 Id. 286; *Swain v. Roscoe*, 3 Iredell's Law, 200; *Jordan et al. v. Green et al.*, 1 Devereux's Equity, 270; *Cutlar's Adm'rs v. Cutlar's Executors*, 2 Haywood, 154; *Jarvis et al. v. Wyatt*, 4 Hawks, 227; *M'Graw v. Davenport and wife*, 6 Porter, 320, 329; *Woodley v. Findlay et al.*, 9 Alabama, 716; *Machen, Ex'r, v. Machen*, 15 Id. 373, 375; *James' claim*, 1 Dallas, 47; *Miller v. Lynn*, 7 Barr, 443; *In the matter of Sanders*, 4 Paige, 293; *Cushney v. Henry*, Id. 345.

As a general rule, it is well settled,

that in the construction of marriage articles, the controlling principle is to give effect to the intention of the parties; and in seeking to attain this end, the Court is not restrained by the technical rules which prevail in limitations of legal estates and executed trusts, but indulges in a liberal interpretation, so as to secure the protection and support of those interests, which, from the nature of the instrument, it must be presumed, were intended to be secured: and if a settlement is made in the very words of the articles, yet if the legal effect of those words is not according to the intention, the settlement will be reformed. *Gaillard v. Porcher et al.*, 1 M'Mullan's Equity, 358; *Smith v. Maxwell's Ex'r*, 1 Hill's Chancery, 101; *Ex'r of Allen v. Rumph and others*,

2 Id. 1, 3; *Gause v. Hale*, 2 Iredell's Equity, 241, 243; *Neves et al. v. Scott et al.*, 9 Howard's S. Ct. 197, 212.

With regard to the persons in whose favor equity will decree execution of marriage articles, or other executory trusts, see *Bleeker v. Bingham*, 3 Paige, 246, 249; *King v. Whitely*, 10 Id. 465, 468; *Dennison v. Goehring*, 7 Barr, 175; *Neves et al. v. Scott et al.*, 9 Howard's S. Ct. 197, 208; and in respect to the certainty required in the trusts, see *Sledge's Adm'rs et al. v. Clopton*, 6 Alabama, 589, 603. In regard to the provisions which the court will order to be inserted in a settlement upon a married woman, see *Temple v. Hawley*, 1 Sandford, 154, 178; *Grout v. Van Schoonhoven*, Id. 337, 343.

PURCHASES BY TRUSTEES.

[*36]

*KEECH v. SANDFORD.

OCTOBER 31, 1726.

REPORTED SELECT CASES IN CHANCERY, 61.

RENEWAL OF A LEASE BY A TRUSTEE.]—*Lease of a Market devised to a Trustee for the Benefit of an Infant; Lessor, before the Expiration of the Lease, refuses to renew to the Infant; Trustee takes it to himself; he shall be obliged to assign to the Infant, and account for the Profits.*

A PERSON being possessed of a lease of the profits of a market, devised his estate to a trustee in trust for the infant. Before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that, it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do.

There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself.

Bill is now brought [by the infant] to have the lease assigned to him, and

for an account of the profits on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of cestui que use, which principle was agreed on the other side, though endeavored to be differenced on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR KING.—I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to cestui que use. Though I do not say there is a fraud in this case, yet he [the *trustee] should rather have let it run out than to have had the lease to himself. This may [*37] seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to cestui que use.

So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

Keech v. Sandford, sometimes called the *Rumford Market Case*, is usually cited as the leading authority on the doctrine of constructive trusts arising upon the renewal of a lease by a trustee or executor in his own name and for his own benefit. The rule here inflexibly laid down by Lord King has ever since been invariably followed, viz. that a lease renewed by a trustee or executor, in his own name, even in the absence of fraud and upon the refusal of the lessor to grant a new lease to the cestui que trust, shall be held upon trust for the person entitled to the old lease; see *Fitzgibbon v. Scanlan*, 1 Dow, 261, 269; *Rawe v. Chichester*, Amb. 715; S. C., 1 Bro. C. C. 198, n.; 2 Dick, 480; *Pickering v. Vowles*, 1 Bro. C. C. 198; *Pierson v. Shore*, 1 Atk. 480; *Nesbitt v. Tredennick*, 1 Ball & B. 46; *Abney v. Miller*, 2 Atk. 597; *Edwards v. Lewis*, 3 Atk. 538; *Killick v. Flexney*, 4 Bro. C. C. 161; *Moody v. Matthews*, 7 Ves. 174; *James v. Dean*, 11 Ves. 383; *Parker v. Brooke*, 9 Ves. 583; *Lovatt v. Knipe*, 12 Ir. Eq. Rep. 124; see also *Walley v. Walley*, 1 Vern. 484; and *Holt v. Holt*, 1 Ch. Ca. 190, which seems to be the oldest case upon the subject. The same rule applies also to an executor de son tort renewing in his own name: *Mulvany v. Dillon*, 1 Ball & B. 409; *Griffin v. Griffin*, 1 S. & L. 352. But where a trustee obtains a new lease, which comprises, not only the premises in the original lease, but also additional lands, the trusts will not attach upon the additional lands: *Acheson v. Fair*, 3 D. & W. 512; 2 C. & L. 208.

The ground of decreeing renewals by trustees and executors to enure to the benefit of cestuis que trust is public policy to prevent persons in such situations from acting so as to take a benefit to themselves: *Griffin v. Griffin*, *1 S. & L. 354, per Lord Redesdale; and see *Blewett v. Millett*, 7 Bro. [*38] P. C. 367, Toml. ed.

So, if a person having a limited interest in a renewable lease, as a tenant

for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease: (*Rawe v. Chichester*, Amb. 715; S. C., 2 Dick. 480; 1 Bro. C. C. 198, n.; *Taster v. Marriott*, Amb. 668; *Owen v. Williams*, Amb. 734; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Bowles v. Stewart*, 1 S. & L. 209; *Randall v. Russell*, 3 Mer. 190; *Giddings v. Giddings*, 3 Russ. 241; *Nesbitt v. Tredennick*, 1 Ball & B. 46; *Eyre v. Dolphin*, 2 Ball & B. 290; *Tanner v. Elworthy*, 4 Beav. 487; *Waters v. Bailey*, 2 You. & Coll. C. C. 224; *Buckley v. Lanauze*, L. & G., t. Plunk. 327; *Hill v. Mill*, 12 Ir. Eq. Rep. 107; *Mill v. Hill*, 3 H. L. Cas. 828;) and in the case of a tenant for life under a will, even although the original lease may have expired during the life of the testator, who had continued to hold merely as a tenant from year to year. See *James v. Dean*, 11 Ves. 383; S. C., 15 Ves. 236, where a testator bequeathed leaseholds for years determinable upon lives to his widow (who was his residuary legatee and executrix) for life, with remainder over; the term expired during the testator's life, who continued to hold as tenant from year to year: a subsequent lease, obtained by his widow, was held to be subject to the trusts of the will, as the residue of the term at his death, if any, however short, would have been. "The question," said Lord Eldon (see 11 Ves. 395,) "is, as the interest which passed at the testator's death was an interest he could bequeath by a will antecedent to his acquiring it, and that interest, though but a tenancy from year to year, being bequeathed to one for life, with remainder to another, if, during the tenancy of the person who took for life, acting upon the goodwill that accompanies the possession, she gets a more durable term, whether the persons who are to take against her, are or are not entitled to say, that term is acquired for their benefit as well as her own. If she had died in his lifetime, his term from year to year would have passed to the remainderman, who would have been specifically entitled to it. The consequence is, the term, though short, is bequeathed in these particular estates; and it cannot depend upon the question, whether the interest is long or short. Suppose only a quarter of a year subsisted at the death of the testator, if the tenant for life did renew, it must have been as well for the benefit of the persons to take afterwards as herself." If, however, the testator in *James v. Dean* had only been tenant at will or at sufferance, the widow upon renewal of the lease would not have been a trustee for the persons to whom the leaseholds were bequeathed in remainder, for as [*39] a tenancy at will or at sufferance would have determined upon the death of the testator, no interest would have passed to them by the will; but Lord Eldon was inclined to think, that, had the widow not been residuary legatee, she would, in such a case, have been a trustee for the residuary legatee. "The question," observed his Lordship, (see 11 Ves. 392,) "is new, whether an executrix, dealing with the opportunities which she derives by her succession without title to the estate a tenant by sufferance or at will had held, is a trustee for the person, who cannot say he took an interest under the will, or whether it is to be said against her only, that the advantage she made of those opportunities should be for the general estate. The result is this: I think it is impossible she could hold it for herself. Not applying it to this

case, but supposing another person, not the wife, was residuary legatee, the question, I should think, would be in favor of that other residuary legatee, being a casual advantage from the dealing of the executrix." See also *Randall v. Russell*, 3 Mer. 190; *Mill v. Hill*, 3 H. L. Cas. 866.

Although a tenant for life of a lease under a settlement be himself the author of it, if he renew the lease in his own name, he will be a trustee for the parties interested under the settlement: *Pickering v. Vowles*, 1 Bro. C. C. 197; *Colegrave v. Manby*, 6 Madd. 72; S. C., 2 Russ. 238. And the fact of the settlement containing a special provision that a particular renewal shall enure for the benefit of the trust, will not prevent the application of the general rule: *Tanner v. Elworthy*, 4 Beav. 487.

In *Brookman v. Hales*, 2 V. & B. 45, a tenant for life of renewable leaseholds had a general power of appointment, which she did not exercise; it was held that a renewal in her own name, not being an execution of the power, enured over at her death for the benefit of the remainderman.

If one of several persons jointly interested in a lease renew it in his own name, he will hold in trust for the others, according to their respective shares. Thus, in *Palmer v. Young*, 1 Vern. 276, one of three who held a lease under a dean and chapter, surrendered the old lease, and took a new one to himself: the Court said it should be a trust for all. See also *Hamilton v. Denny*, 1 Ball & B. 199; *Jackson v. Welsh*, L. & G., t. Plunk. 346. And if a person jointly interested with an infant, renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial, the infant can claim his share of the benefit to be derived from it. This is the peculiar privilege of the unprotected situation of the infant. But to any sums which may have been paid for the renewal of the lease, or in consequence of *it, the infant must contribute his due proportion, before he can claim [*40] any advantage: *Ex parte Grace*, 1 B. & P. 376.

So, likewise, if a partner renew a lease of the partnership premises on his own account, he will be held a trustee of it for the firm. "It is clear," observes an eminent judge, "that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises where the joint trade is carried on, for his own individual benefit: if he does so treat, and obtains a lease in his own name, it is a trust for the partnership. In this respect there can be no distinction, whether the partnership is for a definite or indefinite period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners, 'The premises on which we carried on our trade have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on that trade here:'" per Sir William Grant, M. R., in *Featherstonhaugh v. Fenwick*, 17 Ves. 311. See also *Alder v. Fouracre*, 3 Swanst. 489; *Fawcett v. Whitehouse*, 1 Russ. & My. 132. *Clegg v. Edmonson*, 22 Beav. 125. In *Clegg v. Fishwick*, 1 Mac. & G. 294; the plaintiff's husband being engaged in partnership with other persons, they took a lease in 1828 of certain coal

mines, for the purposes of the partnership. He died in 1836, and the plaintiff took out letters of administration. There was no provision made for the continuance of the partnership with the administratrix; but it was in fact carried on between her and the other partners up to the year 1849, the same partnership property being used for the purposes of the partnership. In that year the old lease having expired a new lease was taken by some of the other partners, without the privity of the plaintiffs. It was held by Lord Cottenham, C., that the Administratrix was entitled to a Receiver in respect of the intestate's share of the partnership including the renewed lease.

If a mortgagee renew a lease, the renewal shall be for the benefit of the mortgagor, paying the mortgagee his charges; and per Lord Chancellor Nottingham, "The mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit:" *Rushworth's case*, Freem. 12; *Luckin v. Rushworth*, Finch. 392; S. C., 2 Ch. Rep. 113; *Darrell v. Whitchoy*, 2 Ch. Rep. 59; nor will the case be altered by the expiration of the lease before renewal; *Rakestraw v. Brewer*, 2 P. Wms. 510. See *Nesbitt v. Tredennick*, 1 Ball & B. 29. On the other *hand, if a lessee mortgage leaseholds, and [*41] afterwards obtain a new lease, the new lease will be held a graft on the old one, for the benefit of the mortgagee: *Smith v. Chichester*, 1 C. & L. 486. Upon the same principle, if a person entitled to a lease, subject to debts, legacies, or annuities, renews, the incumbrances will remain a charge upon the renewed lease: *Jackson v. Welsh*, L. & G., t. Plunk. 346; *Winslow v. Tighe*, 2 Ball & B. 195; *Stubbs v. Roth*, 2 Ball & B. 548; *Webb v. Lugar*, 2 You. & Coll. Exch. Ca. 247; *Jones v. Kearney*, 1 C. & L. 34.

If a person, having the right of renewal, sells such right, the money produced by the sale will be affected with the same trusts as the leaseholds, if renewed, would have been. Thus, in *Owen v. Williams*, Amb. 734, where a tenant for life of a crown lease applied for a further term, but a powerful opponent having applied for a grant, the tenant for life gave up her pretensions for a sum of money, Lord Apsley, upon the authority of the principal case, held that the money ought to be settled upon the same trusts as the lease.

A person acting as agent, or in any similar capacity, for a person having an interest in a lease, cannot renew for his own benefit. See *Edwards v. Lewis*, 3 Atk. 538; *Griffin v. Griffin*, 1 S. & L. 352; *Mulvany v. Dillon*, 1 Ball & B. 417; and *Mulhallen v. Marum*, 3 D. & W. 317, in which case a lease was obtained by a person standing, by delegation, in the place of guardians, and who, at the same time, filled the characters of agent, receiver, and tenant; it was set aside by Sir Edward Sugden, L. C., upon the equity arising out of those relations and upon public policy.

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, it seems, any lease made by him bona fide at the best rent; (*Bowles v. Stewart*, 1 S. & L. 230;) and he must account also for the mesne rents and profits and fines which he may have received; (*Mulvany v. Dillon*, 1 Ball & B. 409; *Walley v. Walley*, 1 Vern. 484; *Luckin v. Rushworth*, Finch. 392; *Blewett v. Millett*, 7 Bro. P. C. 367, Toml. ed.; *Rawe v. Chichester*, Amb. 715;) even although the lease had expired before the bill was filed:

Eyre v. Dolphin, 2 Ball & B. 290. But where a tenant for life has renewed, the account will commence only from his decease: *Giddings v. Giddings*, 3 Russ. 241. On the other hand the person who has renewed the lease will be entitled, as in the principal case, to be indemnified against the covenants he may have entered into with the lessor; (*Giddings v. Giddings*, 3 Russ. 241;) and he will also have a lien upon the estate for the costs and expenses of renewing the lease, with interest; (*Rowe v. Chichester*, Amb. *715, [*42] 720; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Lawrence v. Maggs*, 1 Eden, 453, and note; *James v. Dean*, 11 Ves. 383; *Kempton v. Packman*, cited 7 Ves. 176;) and for the expenses of lasting improvements; (*Holt v. Holt*, 1 Ch. Ca. 190; and see *Lawrence v. Maggs*, and note; *Mill v. Hill*, 3 H. L. Cas. 828, 869;) even though incurred after the institution of the suit; (*Walley v. Walley*, 1 Vern. 487;) but not for any improvements adopted as a mere matter of taste, or as a matter of personal convenience; (*Mill v. Hill*, 3 H. L. Cas. 869;) at the same time there may be many charges in the nature of waste, and as to deterioration, which must be set off against anything found due in respect of improvements. (*Ib.*) So, also, will a tenant for life have a lien for such proportion of the fine upon renewal as ought to be borne by the remainderman: *Lawrence v. Maggs*, and note by Eden. As to contribution towards payment of fines upon renewals, see *White v. White*, 9 Ves. 554; *Playters v. Abbott*, 2 My. & K. 97; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 111; *Reeves v. Creswick*, 3 You. & Coll. Exch. Ca. 715; *Jones v. Jones*, 5 Hare, 440; *Giddings v. Giddings*, 3 Russ. 241, 259. *Tudor's Lead. Cas. Real. Prop.* 50, 59.

The same remedies which, as we have before seen, may be had against trustees, executors, and persons with limited interests, renewing leases in their own names, may also be had against volunteers claiming through them; (*Bowles v. Stewart*, 1 S. & L. 209; *Eyre v. Dolphin*, 2 Ball & B. 290; *Blewett v. Millet*, 7 Bro. P. C., Toml. ed., 367;) and against purchasers from them, with notice express or implied: *Walley v. Walley*, 1 Vern. 484; *Eyre v. Dolphin*, 2 Ball & B. 290; *Parker v. Brooke*, 9 Ves. 583. In *Coppin v. Fernyhough*, 2 Bro. C. C. 291, a recital in a lease, assigned to a mortgagee, of the surrender of a former lease, in which mention was made of the settlement under which the cestui que trust claimed, was held to be constructive notice.

And where a deed by which the lease is settled is registered under the Irish Registry Act, (6 Ann. A. 2,) a purchaser, although without notice from a person having a limited interest, who has renewed the lease in his own name, will be held to be a trustee for the parties interested under the settlement: *Hill v. Mill*, 12 Ir. Eq. Rep. 107; S. C. nom. *Mill v. Hill*, 3 H. L. Cas. 828.

But the cestui que trust may be bound by acquiescence and lapse of time. See *Isald v. Fitzgerald*, cited in *Owen v. Williams*, Amb. 735, 737; *Norris v. Le Neve*, 3 Atk. 38; *Jackson v. Welsh*, L. & G., t. Plunk. 346.

It is undetermined whether the purchase of the reversion from the lessor by trustees or a tenant for life of a lease comes within the *rule which [*43] precludes them from renewing such lease for their own benefit, although such a purchase may be made from a stranger. In *Randall v. Russell*, 3 Mer.

190, where a tenant for life of leaseholds held of a college, purchased the reversion in fee from a stranger, to whom the college had sold it; upon a bill filed by the remaindermen, contending that the situation of the tenant for life gave her an opportunity to make the purchase, and that she ought to be turned into a trustee of the reversion for them, Sir William Grant, M. R., said that no case was mentioned in which this sort of equity had been carried to such a length. The college had aliened the property to an individual. The benefit attending the tenant right of renewal with a public body was gone, and a lease at rack rent was all that was to be expected from the private proprietor. His Honor, therefore, held, that the reversion was not subject to the trusts of the will. With respect to the question, whether the tenant for life could have become a purchaser of the reversion, not from a mere stranger, but from the college, his Honor observed, that it might be said that she thereby intercepted and cut off the chance of future renewals, and consequently made use of her situation to prejudice the interests of those who stood behind her; and that there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests, although he was not aware of any decision to that effect. See *Hardman v. Johnson*, 3 Mer. 347; *Norris v. La Neve*, 3 Atk. 37; *Lesley's case*, Freem. 52. Where, however, the executor of a mortgagee purchased the equity of redemption of the mortgaged estate in his own name, with the money due on the mortgage and a small advance beyond it, he was held to be a trustee of the purchased property for the benefit of the testator's estate. *Fosbrooke v. Balguy*, 1 My. & K. 226.

A quasi tenant in tail of leaseholds, being the absolute owner of them, is not bound by the same equities as persons having merely limited interests; thus, where a testator devised leaseholds for lives to trustees for A. and the heirs of his body, and if he should die without issue, remainder to B., A. surrendered the old lease, and took a new one to himself and his heirs for three new lives, and died without issue, having devised the leaseholds to his widow for life, remainders over. A bill, filed by B., to have the benefit of the new lease, insisting that the surrender of the old lease, and taking the new one, was not sufficient to bar the limitation to him, and that those claiming under A. ought to be held trustees of the new lease, was dismissed: *Blake v. Blake* 1 Cox, 266.

[*44] Where a stranger obtains a renewal *of a lease, or a reversionary lease, the old tenant has no equity against him: *Lee v. Lord Vernon*, 5 Bro. P. C. 10, Toml. ed.; *Earl of Sandwich v. Earl of Litchfield*, Colles, P. C. 104; *Stokes v. Clarke*, Colles, P. C. 192; *Nesbitt v. Tredennick*, 1 Ball & B. 29; *Lesley's case*, Freem. 52; *The Attorney-General v. Gains*,¹¹ Beav. 63. Nor, it seems, has a lessee any equity against his sub-lessee, who obtains a renewal from the head landlord without consulting him: *Maunsell v. O'Brien*, 1 Jones, 176, Exch. Rep. (Ireland).

[Whether a partner who obtains a conveyance of the reversion of a lease which has been made for partnership purposes, for his own benefit, without communicating the object he has in view to his co-partners, will be regarded as a trustee for the firm, seems to be doubtful, but a trust will certainly follow,

if he represents himself to be buying for the common good, and thus obtains a grant which might otherwise have been refused: *Anderson v. Lemon*, 4 Sandford, 552; 4 Selden, 236. The point arose in *Anderson v. Lemon*, where Gardiner, J., held the following language in delivering the opinion of the Court: "In a note to *Moody v. Matthews*, (7 Ves. 185, Sumner's Ed.,) it is said, as a deduction from adjudged cases, that with a possible exception in favor of a bona fide purchaser, it seems to be an universal rule that no one who is in possession of a lease, or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only, but such renewal must be construed as a graft upon the old stock. In *Featherstonhaugh v. Fenwick*, (17 Ves. 298,) it was held that a renewal obtained one month before the expiration of the lease, by two of three partners, for their own benefit, enured to the partnership and must be accounted for as partnership property. But it has been held in several cases, that during the continuance of the lease, any one, even a trustee of the leasehold interest, may purchase the reversion in fee on his sole account, for although the *cestui que trust* will be deprived of all claim of renewal, yet it has been thought impossible to consider the purchase of the inheritance as a graft upon leasehold or life interests: (7 Ves. 186, note, Sumner's Ed.; 3 Meriv. 197, 352; 3 Atk. 38.) The learned Judge who delivered the opinion of the Superior Court, was therefore correct in saying that a co-partner was at liberty to make the purchase stated in this case, under circumstances free from deception and fraud, and consequently to retain it." But it was notwithstanding decided, that although the defendant would have been entitled to the benefit of his purchase, if his conduct had been fair and open, yet, as he had been guilty of misrepresentation to the vendor, and concealment from his co-partners, equity would redress the wrong by raising a trust for their benefit.]

It is a principle firmly maintained in the equity jurisprudence of this country, that a trustee is not at liberty to act or contract for his own benefit in regard to the subject of the trust, and that the advantage of all that he does about the trust property shall accrue to the *cestui que trust*, if the latter desire it. An independent interest in a trustee, in the subject of the trust, would, in its very nature, be an interest hostile to the *cestui que trust*; and that is repugnant to the relation which the trustee has assumed. So far as he acts about the property for himself, distinctly, he divests

himself of the character of trustee for another; and this by his own act he cannot do. The *cestui que trust* has a claim to his entire services about the subject which has been confided to him; and equity, therefore, affects with a trust all his transactions and agreements in respect to it; at least it does so at the option of the *cestui que trust*. This claim extends as well to the knowledge, as to the influence and power, which the trustee obtains from his situation: and if a person, from being placed in a relation of confidence towards another, or being employed in any fiduciary capacity about

property, acquires peculiar information about its value, or circumstances, or condition, he is disabled from exercising this information for his own benefit, in opposition to him by whose confidence he obtained it. And this is not confined to cases of express and formal trusts; the rule is applied as far as the principle and morality and policy, upon which it is founded, extend. Wherever a confidence is permitted, a duty is assumed, and a trust is the medium by which chancery enforces mere duties in respect to property. Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonist to the person with whose interests he has become associated. If one comes into an interest, by the permission of another, or accepts an interest with another by the act of a third person or of the law, as in the case of tenants in common under the same will or descent, an implied obligation arises to sustain the common interest into which he has been admitted; and equity vindicates it in the form of a trust. A fiduciary obligation sufficient to lead to the enforcement of the prohibitory principle considered in *Keech v. Sandford*, is recognized as resting upon executors and administrators, guardians, agents, mortgagees, tenants for life, joint-tenants and co-parceners, tenants in common coming in under the same purchase or descent, and vendees up to the time of the completion of the conveyance.

That the renewal of a lease by a

trustee enures to the benefit of the *cestui que trust*, is universally admitted in this country. "If we go through all the cases," said Chancellor Kent, in *Davoue v. Fanning*, 2 Johnson's Chancery, 252, 258, "I doubt whether we shall find the rule and the policy of it, laid down with more clearness, strictness and good sense (than in *Keech v. Sandford*.) This decision has never been questioned; and that a trust results on the renewal of an infant's lease, has since been regarded as a familiar point." The authority of *Keech v. Sandford*, and the principle established by it, are also acknowledged in *M'Clanachan's Heirs v. Henderson's*, 2 Marshall's Kentucky, 388, 389; *Cox's Heirs v. Cox & Talbert*, Peck, 443, 450; *Wallington's Estate*, 1 Ashmead, 307, 310; and per Rogers, J. in *Fisk v. Sarber*, 6 Watts & Sergeant, 18, 31, 35. "In chancery," said Duncan, J., in *The Case of Heager's Executors*, 15 Sergeant & Rawle, 65, 66, "the principle is one never departed from, and is as binding as any axiom of the common law; that he who takes upon him a trust takes it for the benefit of him for whom he is intrusted, but not to take any advantage for himself. A trustee shall never be permitted to raise in himself an interest opposite to that of his *cestui que trust*. . . . If a trustee or executor obtain the renewal of a term in trust, such renewal shall be for the benefit of the trust: *Holt v. Holt*, 1 Chan. Cas. 191. Nor will the circumstance of the lessor having refused to renew to the *cestui que trust*, he being an infant, differ the case: Chan. Cas. 61. There cannot well be a stronger proof of the inflexibility of the rule than this: he may decline

to accept the lease; but if he does, though the lessor would not grant the benefit to the infant, if his trustee chooses to take it, it enures to the benefit of the infant." "Where an executor or guardian," said Kennedy, J., in *Galbraith v. Elder*, 8 Watts, 81, 94, 95, "renews a lease, though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease." The same principle, in its application as between mortgagor and mortgagee, was established in *Holdridge v. Gillespie*, 2 Johnson's Chancery, 30. There, the mortgagee of a lease had surrendered up the old lease, and taken a new one in his own name; and the mortgagor sought relief in equity by a bill in the nature of a bill to redeem. "The plaintiff," said Chancellor Kent, "is entitled to redeem the whole of the premises contained in the lease, and to have the entire advantage of the new lease, on such redemption. The renewed lease enures for the benefit of the mortgagor. According to the cases of *Manlove v. Bale*, and of *Rakestraw v. Brewer*, (2 Vern. 84; 2 P. Wms. 511,) the additional term comes from the same old root, and is subject to the same equity of redemption, otherwise hardship and oppression might be practised upon the mortgagor. It is analogous, in principle, to the case of a trustee holding a lease for the benefit of the *cestui que trust*. Courts of equity have said, that if he makes use of the influence which his situation enables him to exercise, to get a new lease, he shall hold it for the benefit of the *cestui que trust*. (1 Dow. 269; 1 Ch. Cas. 191; 1 Bro. Ch. Cas. 198.) So, if a guardian takes a renewed lease for lives, the trust follows

the actual interest of the infant, and goes to his heir, or executor, as the case may be. (18 Ves. 274.) Indeed, it is a general principle, pervading the cases, that if a mortgagee, executor, trustee, tenant for life, &c., who has a limited interest, gets an advantage by being in possession, 'or behind the back' of the party interested in the subject, or by some contrivance in fraud, he shall not retain the same for his own benefit, but hold it in trust. (Lord Manners, in 1 Ball & Beatty, 46, 47; 2 Ball & Beatty, 290, 298.) The doctrine has been uniform from the decision of Lord Keeper Bridgman, above referred to in 1 Ch. Cas. 191, down to the most recent decisions." The rule was enforced in an analogous case, in *Huson v. Wallace*, 1 Richardson's Equity, 2, 4, 7, where an intestate had contracted for the purchase of a tract of land to which a ferry was attached, and his wife becoming administratrix, had obtained after his death a re-charter of the ferry in her own name. "From analogy to the doctrine of renewing leases by trustees or tenants," said Harper, C., "I am of opinion that she must be considered a trustee" for the children. He then reviewed the cases from *Keech v. Sandford*, down; and added, "It is to be observed, that in most of these cases there was no covenant for renewal, so that it was at the option of the lessors to renew or not; but, as it is said, there is a goodwill in favor of the former tenant, which gives him an interest in the renewal. . . . (The children) had that interest in the renewal of the charter, of which the cases speak, and that claim on the goodwill and preference of the legislature, which we know, in point of fact, to be almost always shown to the

former grantees, and owners of the adjoining land ; and was it not plainly against equity that, disregarding this claim, she should procure the entire benefit to herself?"

Upon a similar ground, it is a settled rule in equity, that if a trustee purchases claims or incumbrances against the trust estate, at a discount, the purchase shall enure to the benefit of the interest which it is his duty to protect. In *Green v. Winter*, 1 Johnson's Chancery, 27, 36, a trustee had bought in, at a discount, a mortgage on the trust property. "This purchase," said the Chancellor, "ought justly, and upon all sound principles of equitable policy, to enure to the benefit of the trust, and not to the benefit of the trustee. A trustee is not permitted to use the information he gains as trustee, by purchasing in for himself. A court of equity watches the conduct of a trustee with jealousy ; and if he compounds debts or mortgages, or purchases them in, at a discount, he shall not be suffered to turn the speculation to his own advantage." See also *Van Horne v. Fonda*, 5 Id. 388, 409 ; *Hawley v. Mancius*, 7 Id. 175, 188 ; *Giddings v. Eastman*, 5 Paige, 561 ; *Steele v. Babcock*, 1 Hill's N. Y. 528, 530 ; *The case of Heager's Executors*, 15 Sergeant & Rawle, 65 ; *Boyd v. Hawkins*, 2 Iredell's Equity, 304, 306 ; *Prevost v. Gratz et al.*, 1 Peters's C. C. 365, 373 ; *Calvert v. Holland*, 9 B. Monroe, 458, 463. The trustee, however, is entitled to be reimbursed the amount he has expended, with interest ; *Quackenbush v. Leonard*, 9 Paige, 334, 344 ; *Mathews & Wife v. Dragaud and others*, 3 Dessausure, 25, 28. The same principle is applied where a trustee buys

in an adverse claim to the trust estate : the purchase accrues to the benefit of the *cestui que trust*, who, however, must reimburse the trustee to the extent of his outlay ; *M'Clanachan's Heirs v. Henderson's*, 2 Marshall, 388, 389 ; *Morrison's Ex'or v. Caldwell*, 5 Monroe, 426, 435 ; *Kellogg v. Wood*, 4 Paige, 578, 621.

The relations between mortgagor and mortgagee are in many respects, the same with those which exist between *cestui que trust* and trustee, and it has consequently been held that when land sold by the mortgagee under a power conferred by the mortgage, is bought by him or for his benefit, it will be charged with the same trust as before the sale, and consequently subject to the equity of redemption of the mortgagor ; *Hyndman v. Hyndman*, 19 Vermont, 9 ; *Burnham v. Rowe*, 2 California, 387.

Joint-tenants and co-parceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other : and, therefore, a purchase, by a joint-tenant or co-parcener, of an incumbrance on the joint estate, or an outstanding title to it, is held, at the election of his co-tenants within a reasonable time, to enure to the equal benefit of all the tenants, upon condition that they will contribute their respective ratios of the consideration actually given ; *Lee & Graham v. Fox, &c.*, 6 Dana, 171, 176. The same equity is considered as subsisting between tenants in common under the same instrument ; and was enforced in *Van Horne v. Fonda*, 5 Johnson's Chancery, 388, 407, a case of two devisees of an imperfect title under a will.

"I will not say," observed the Chancellor in that case, "that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine, and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseise and expel his co-tenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which created a mutual obligation, to deal candidly and bene-

volently with each other, and to cause no harm to their joint interest." This language was cited in *Fogg v. Mann*, 2 Sumner, 486, 522, and *Weaver v. Wible*, 1 Casey, 270, and said to be equally consonant with authority and principle. The co-tenant, however, upon availing himself of the purchase, becomes subject to an equal contribution to the expense. Id. 408. In *Ligget v. Bechtol*, it is said to have been decided "that two tenants in common, who had heard of an adverse title, and agreed to join in defending against it, or in purchasing, were bound to deal fairly with each other; and that one of them who purchased the adverse title for a small sum, must hold it in trust for the other, upon that other paying his proportion of the purchase-money: and the law (said Huston, J.) is clearly as decided in *Van Horne v. Fonda* and this case; nay, it goes further; and wherever two have a joint estate, it raises a duty in each to deal fairly with the other; and one who purchases an adverse title, will not be allowed to sweep all from his co-tenant; unless some special circumstances occur in the cases;" *Smiley v. Dixon*, 1 Penrose & Watts, 439, 441. The same view was taken in *Lloyd v. Lynch*, 4 Casey, 419, and the purchase of an outstanding title, by one of several tenants in common, said to enure for the benefit of all; and in *Weaver v. Wible*, a widow who came into the possession of land under her deceased husband, was held to fall within the operation of a like principle, and to be precluded from buying in an outstanding title to the prejudice of his heirs. (See *Galbraith v. Elder*, 8 Watts, 81, 95; *Morey v. Herrick*, 6 Harris, 123, 128; and

Myer's Appeal, 2 Barr. 463, 466.) In South Carolina also, it is said to have been held that a tenant in common in possession is a trustee to preserve the estate for the rest; *Goulding v. Goulding*, cited in *Huson v. Wallace*, 1 Richardson's Equity, 9. But tenants in common, probably, are subject to this mutual obligation, only when their interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another: for persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests, than would be required between strangers. See *Matthews v. Bliss*, 22 Pickering, 48.

It has however, been said, that one co-tenant will be presumed to be acting for the joint benefit of all, unless he manifests a contrary intention by acts sufficiently notorious to put the others on their guard; *Baker v. Whiting*, 3 Sumner, 475, 495; and there can be no doubt that when a promise or agency is superadded to the obligation arising from community of title, its performance will be enforced by equity. Hence a tenant in common who attends a sale made by the State for the non-payment of taxes under a promise to buy for himself and his co-tenant, will not be permitted to appropriate the purchase solely to his own benefit, and will be made a trustee for the share of the co-tenant; *Stewart v. Brown*, 2 S. & R. 461.

A tenant for life is bound to the same consideration of the interests of those in remainder and reversion, as is required between joint-tenants; and if

he purchases an incumbrance or outstanding title, it becomes in his hands a trust for their benefit; *Bowling's Reps. v. Dobyn's Adm'r*, 5 Dana, 434, 446; *Stump and others v. Findlay and others*, 2 Rawle, 168, 174. In *Dickinson and Wife v. Codwise and others*, 1 Sandford, 214, 225, it was held that a husband purchasing a gore of land which controlled the access to stores built upon his wife's land, and which could not be used separately for any valuable purpose, must be considered as purchasing in trust for the wife's interest. "As husband," said the Asst. V. Chancellor, "in the possession of a life estate in her lands, *jure mariti*, he had a duty to perform which was incompatible with the purchase of this gore for his own exclusive benefit. He used the means given to him by his position as husband, and obtained this grant. The general principle of equity which prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase, has been steadily and uniformly enforced, from the time of Lord Keeper Bridgman in 1670, (*Holt v. Holt*, 1 Cha. Cas. 190,) to the present day.

A vendee of lands, entering before the conveyance is perfected, is affected with the same equity in favor of his vendor; and if he purchases an adverse title he cannot set it up against the vendor, but the vendor is entitled to have it, upon reimbursing the purchaser; *Morgan's Heirs v. Boone's Heirs*, 4 Monroe, 291, 298; *Harper v. Reno et al.*, 1 Freeman's Chancery, 323, 333; *Wood v. Perry*, 1 Barbour, 115, 134; see 2 Smith's Leading Cases, 659, 5th Am. ed.

The rule which entitles the landlord to the benefit of acquisitions made

by his tenant, from the adjoining waste during the term, may, perhaps, be referred to the same principle; *Kingswell v. Willard*, 11 Exchequer, 313, as well as the estoppel by which the tenant is precluded from disputing the title of the landlord; 2 Smith's Leading Cases, 657, 5th Am. ed.

An agent undertaking any business for another, is disabled in equity from dealing in the matter of the agency upon his own account or for his own benefit. If an agent employed to procure a lease, or to purchase lands, for another, take a lease or conveyance in his own name, he will be considered as holding it in trust for his principal; *Parkist v. Alexander*, 1 Johnson's Chancery, 394; *Howell v. Baker*, 4 Id. 118, 120; *Sweet v. Jacocks*, 6 Paige, 355, 359, 364; *Heacock and others v. Coatesworth and others*, 1 Clarke, 84, 86; *Massie v. Watts*, 6 Cranch, 148, 170; *Ringo et al. v. Binns et al.*, 10 Peters, 270; *Rankin v. Porter*, 7 Watts, 387; *Church v. Sterling*, 16 Connecticut, 389, 400; *Segar v. Edwards and Wife*, 11

Leigh, 213; *Wellford et als. v. Chancellor*, 5 Grattan, 39; *Switzer et al. v. Skiles et al.*, 3 Gilman, 529; *Baker v. Whiting*, 3 Sumner, 475; *post*, note to *Fox v. Mackreth*.

An attorney or counsellor at law, who has been consulted professionally in regard to a title, cannot afterwards purchase an outstanding adverse title to the land, for himself; his purchase will enure to the benefit of his client; *Galbraith v. Elder*, 8 Watts, 81, 94, 100; *Cleavinger v. Reimar*, 3 Watts & Sergeant, 487, 493; *Hockenbury v. Carlisle*, 5 Id. 348, 350. [And it has been said that this fidelity of counsel must be forever observed, and that equity will look with the same disfavor on the purchase of an adverse title after the relation of client and attorney has ceased, as while it continues; *Galbraith v. Elder*; *Henry v. Raiman*, 1 Casey, 354, 360.]

The cases relating to the inability of a trustee to be a purchaser of the trust property on his own account, at a sale of it, will be found in the note to *Fox v. Mackreth, post*.

APPLICATION OF PURCHASE-MONEY.

*ELLIOT v. MERRYMAN.

[*45]

JULY 1, 1740, AT THE ROLLS.

REPORTED BARNARDISTON'S CHANCERY REPORTS, 78. S. C., 2 ATK. 4.

LIABILITY OF A PURCHASER TO SEE TO THE APPLICATION OF HIS PURCHASE-MONEY.]—*A purchaser of personalty from an executor will not be held liable to see to the application of the purchase-money, except in cases of fraud.*

It is a general rule, that, where real estate is devised to trustees, upon trust to sell for payment of debts generally, the purchaser is not bound to see that the money is rightly applied. The same rule applies where real estate is

not devised to be sold for the payment of debts, but is only charged with such payment.

If real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

THOMAS SMITH became indebted to several persons by bond and likewise by simple contract. In three of these bonds Goodwin was bound with him as surety; and afterwards Goodwin gave his own bond alone to one of the creditors, to whom Smith was bound in a single bond. Smith, being thus indebted, made his will, and, in the beginning of it, says, "*my will is, that all my debts be paid; and I do charge all my lands with the payment thereof.*" Then came the clause, upon which, together with the other circumstances of the case, the present question principally determines. "*Item.—I give all my real and personal estate to — Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable, nevertheless, with the payment of all my debts and legacies.*" Of this will he made Goodwin his executor. [*46] *The testator died in 1724; Goodwin proved the will, and in that same year sold a freehold estate of the testator's to Hunt; in the year following sold a leasehold estate of the testator's to Wright; and, in 1727, sold another estate of the testator's, consisting of both freehold and leasehold, to Merryman.

In the several deeds by which these estates were conveyed from Goodwin to the purchasers, the will of Smith was recited; and to one of those deeds Elliot, a creditor of Smith's, was a subscribing witness. These lands were sold in the neighborhood by outcry. At the time of these sales, the creditors, all of them, either lived in the town where Goodwin lived, or within three or four miles of it. During all this time, and till the year 1730, the creditors went on regularly receiving their interest, which was at 5*l.* per cent., of Goodwin. Goodwin was a solvent man till 1732, and then he became a bankrupt.

In 1734 the present bill was brought by the creditors of Smith against the purchasers of these lands that have been mentioned against Goodwin, and against the assignees under his commission, in order to have a satisfaction of their debts out of those lands which were sold by Goodwin.

Mr. Chute argued on the part of the plaintiffs, and for authority cited 2 Vern. 528,¹ 616,² *Pagett v. Hoskins*, in *Precedents in Chancery*,³ and the case of *Morley v. Webb*, determined by the present Chancellor [Lord Hardwicke.]

Mr. Idle, on the same side, cited 2 Vern. 444;⁴ and on the same side Mr. Murray cited the case of *Nugent v. Gifford*,⁵ determined by the present Chancellor.

¹ Chadwick v. Doleman.

⁴ Hamble v. Bill.

² Crane v. Drake.

⁵ 1 Atk. 463.

³ Prec. Ch. 431.

Mr. *Brown* argued as counsel for Hunt and Wright, and for authority cited 2 Cha. Ca. 115,¹ and the case of *Abbot v. Gibbs*.²

Mr. *Noel* argued on the same side, and cited 1 Vern. 45,³ 411,⁴ and *Williams*, 430.⁵

Mr. *Hoskins* argued as counsel for Merryman, and cited 1 Vern. 303.⁶

*THE HON. JOHN VERNEY, M. R.—His Honor said, his opinion [*47] was that the plaintiffs were not entitled to the relief they sought by the bill. He said it was very true, that it was almost impossible to make a determination in the present case, but that it must fall out unfortunately on the one party or the other. The dispute arising between creditors on the one side, and purchasers on the other, both these sorts of persons are entitled to the favor of this Court; and in the present case a misfortune must fall upon one of them. On whom it is to fall, is the question. And this is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point.

The case is this:—Thomas Smith, being possessed of a real and personal estate, was indebted to several persons by bond, in three of which bonds Goodwin was bound with him as surety; and he had contracted likewise some other debts; and being thus indebted, he makes his will to the following effect. The will begins with this introduction:—"My will is, that all my debts be paid; and I do charge all my lands with the payment thereof. *Item*.—I give all my real and personal estate to — Goodwin, to hold to him, his heirs, executors, administrators, and assigns, chargeable, nevertheless, with the payment of my debts and legacies." 'Tis indeed true that these words do not amount to a devise of the lands to be sold for the payment of the debts; and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the Statute of Fraudulent Devises,⁷ and does interrupt the descent to the heir-at-law. By this will the devisee was made executor.

The testator died in 1724. Goodwin paid interest for the debts at 5l. per cent. regularly till 1730. After the testator's death, three sales of this estate were made by Goodwin: one, of an estate which was entirely freehold; the other, of an estate entirely leasehold; and a third, consisting of freehold and leasehold both.

The bill in general is brought by the creditors of Smith *against the purchasers, in order to have a payment of their debts out of the lands [*48] of Smith, which were sold to them by Goodwin.

With regard to the leasehold estate, the case is so extremely plain, that the sale of that must stand, and that the creditors cannot have a satisfaction out of it, that his Honor said it would be monstrous to call it in question. The executors are the proper persons that, by law, have a power to dispose of a testator's personal estate. 'Tis indeed true that personal estate may be clothed

¹ *Culpepper v. Aston*.

⁴ *Cloudsley v. Pelham*.

⁶ *Spalding v. Shalmer*.

² 1 Eq. Ca. Abr. 358.

⁵ *Freemoult v. Dedire*, 1 P. Wms. 430.

⁷ 3 W. & M. c. 14.

³ *Newman v. Johnson*.

with such a *particular trust*,¹ that it is possible the Court in some cases may require a purchaser of it to see the money rightly applied. But unless there is some such *particular trust*, or a *fraud* in the case, it is impossible to say but the sale of a personal estate, when made by an executor, must stand; and that after the sale is made, the creditors cannot break in upon it.

His Honor said, he would now consider the other sales, that have been made, and would examine those, first, upon the general rules of the Court, and in the next place upon the particular circumstances which this case is attended with.

With regard to the first of these matters, the general rule is, that *if a trust directs that land should be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied.* On the other hand, *if the trust directs that lands should be sold for the payment of certain debts, mentioning, in particular, to whom those debts were owing, the purchaser is bound to see that the money be applied for the payment of those debts.*

The present case, indeed, does not fall within either of these rules, because here lands are *not given to be sold for the payment of debts, but are only charged with such payment.* However, the question is, whether that circumstance makes any difference. And his Honor was of opinion that it did not. And if such a distinction was to be made, the consequence would be, that whenever lands are charged with the payment of debts generally, they [*49] could never be discharged of that trust without a suit in this Court, which would be extremely inconvenient. *No instances have been produced to show that in any other respect the charging lands with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that there should be a difference established in this respect.* The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till those debts are discharged. And so far, indeed, is true, that where lands are charged with the payment of annuities, those lands will be charged in the hands of the purchaser,² because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinction.

Having thus considered the case under the general rule, his Honor said he would now consider it under the particular circumstances that attend it; and the particular circumstances are such as are far from strengthening the plaintiffs' case, but rather the contrary.

One of those circumstances is the length of time the plaintiffs have lain by,

¹ See *Bonney v. Ridgard*, 4 Bro. C. C. 130; 1 Cox, 145.

² Not, it seems, if there is also a charge of debts. See *Page v. Adams*, 4 Beav. 269.

without at all insisting on any charge upon these estates. Goodwin was a solvent man till his bankruptcy, in 1732. Here have been three purchases of these estates, made at different times—the one in 1727, the other two in 1725 and 1724. The first of them was made by Hunt, the second by Wright, and the third by Merryman. During all these transactions the plaintiffs do not mention one word of their charge upon this estate; but, on the contrary, regularly received their interest of Goodwin till the year 1730. It is indeed true, that there is no express proof that the plaintiffs knew of these purchases, but there is reason to imagine that they *did. The purchases were made [*50] in the neighborhood by outcry; some of the creditors lived in the same town that Goodwin did; and all of them lived within three or four miles of him; and Elliot, one of the creditors, was a subscribing witness to one of the purchase-deeds. The want of notice, too, on the part of the purchasers, is a considerable circumstance in their favor. It is indeed true, that they had notice that there were debts chargeable upon this estate; but it does not appear they knew to whom those debts were owing. Another circumstance is, that Goodwin was a co-obligor in three of these bonds, and to another of the obligees he afterwards gave his bond alone, which may well be considered as a satisfaction for that bond. By this it appears that the creditors greatly relied upon Goodwin for their paymaster; and there is not much reason therefore that they should now be allowed to resort to the testator's estate.

Upon the whole, his Honor's opinion was, that the plaintiffs' bill must be dismissed; and even with costs, as against Wright, there being no manner of pretence for the plaintiffs to come upon that estate, it being all leasehold and sold to Wright by the executor, who by law is the proper person entrusted to dispose of the testator's personal estate. However, with regard to the rest of the defendants, his Honor said he would only dismiss the bill generally, without costs; and so he was pleased to decree accordingly.

Elliot v. Merryman is always cited as a leading case, wherever the question arises as to the liability of a purchaser to see to the application of his purchase-money. See *Bonney v. Ridgard*, 1 Cox, 147; *McLeod v. Drummond*, 17 Ves. 162; *Shaw v. Borrer*, 1 Keen, 547; and *Colyer v. Finch*, 5 H. L. Cas. 923; where the rules laid down in that case were approved of and adopted.

It will be seen, on perusing the judgment of the Master of the Rolls, that, in determining this question, the rules applicable to sales of real estate and to sales of personal estate are not identical. It will be convenient, therefore, to consider these rules as applied to *the two species of property separately. [*51]

Before doing so, it may first be mentioned, that it was enacted by 7 & 8 Vict. c. 76, s. 10, (taking effect from December 31, 1844,) that the bona fide payment to, and the receipt of, any person to whom any money should be payable upon any express or implied trust, or for any limited purpose, should effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary

should be expressly declared by the instrument creating the trust or security. This Act has, however, been repealed by 8 & 9 Vict. c. 106, which takes effect, as to this section of the repealed Act, from October 1st, 1845.

First, as to Purchasers of Real Estate.]—It is clear that trustees in whom real property is vested, upon trust for sale, can *at law* give a valid discharge for the purchase-money, because they are at law the owners. *In equity*, however, the persons amongst whom the produce of the sale is to be distributed are considered the owners; and Courts of equity have therefore held that a purchaser must obtain a discharge from them, unless the power of giving receipts is either expressly or by implication given to the trustees. If no such discharge is given, and the trustees have no power to give receipts, the estate, upon a misapplication of the purchase-money, will remain chargeable in the hands of the purchaser.

Where a power of giving receipts is in express terms conferred upon trustees, the purchaser will not, in cases free from fraud and collusion, be bound to see to the application of the purchase-money. Where, however, no such power is in *express* terms given, much difficulty arises in ascertaining the liability of the purchaser, which depends upon the question whether a power of giving receipts can be *implied*.

One of the rules laid down in the principal case, and which is invariably followed, is, *that, if the trust directs lands to be sold for payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.* See *Dunch v. Kent*, 1 Vern. 261; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Cotterell v. Hampson*, 2 Vern. 5; *Lloyd v. Baldwin*, 1 Ves. 173; *Ithell v. Beane*, 1 Ves. 215; *Doran v. Wiltshire*, 3 Swanst. 701; *Smith v. Guyon*, 1 Bro. C. C. 186; *Rogers v. Skillicorne*, Amb. 189; *Binks v. Rokeby*, 2 Madd. 238. The same rule is applicable also where there is a trust for payment of legacies or annuities, which from their nature must be considered as specified or scheduled debts; *Johnson v. Kennett*, 3 My. & K. 630; *Horn v. Horn*, 2 S. & S. 448.

[*52] In cases coming within this rule, *as the trusts are of a limited and definite nature, and such as a purchaser might without inconvenience see properly performed, a power to give receipts cannot be implied.

Another rule laid down in the principal case is, “*that if a trust directs the land to be sold for the payment of debts generally, the purchaser is not bound to see that the money be rightly applied;*” and it was, for the first time, decided that it makes no difference whether lands are given to be sold for the payment of debts or are only charged with such payment.

The principle upon which this rule proceeds appears to be this: that, as it cannot be presumed that the settlor or testator could expect a trust of so general and unlimited a nature to be undertaken by a purchaser, it is implied that it was intended that the purchaser should be exempt from the necessity of seeing to the application of the purchase-money: *Williamson v. Curtis*, 3 Bro. C. C. 96; *Smith v. Guyon*, 1 Bro. C. C. 186, and Mr. Belt’s note; *Balfour v. Welland*, 16 Ves. 151; *Shaw v. Borrer*, 1 Kee. 559; *Hardwicke v. Mynd*,

1 Anst. 109 ; *Barker v. Duke of Devon*, 3 Mer. 310 ; *Robinson v. Lowater*, 17 Beav. 592, 5 De G. Mac. & G. 272 ; *Dundas v. Blake*, 11 Ir. Eq. Rep. 138, 156 ; *Dowling v. Hudson*, 17 Beav. 248 ; *Storry v. Walsh*, 18 Beav. 559.

So, also, where there is a trust or charge for the general payment of debts, as well as for the payment of legacies or annuities, the purchaser will not be obliged to see to the application of the purchase-money ; for as Lord Thurlow observed, in *Jebb v. Abbott*, (cited by Mr. Butler in his note on Co. Litt. 290, b.,) he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts. In *Benyon v. Gollins*, (cited also by Mr. Butler in the same note,) the testator had charged his estate with the payment of his debts generally, and with a legacy of £800 for his daughter for life, and after her death for her children. The trustee had joined in a conveyance of part of the estate to a purchaser, and permitted the £800 to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchasers of the estate, and against the trustee. It was dismissed against the purchasers. Upon the hearing for further directions, it was pressed by Mr. Ambler, that the trustee should pay the costs of the purchasers. But Lord Thurlow refused this, saying that, as there was a general charge of debts, the purchasers were not liable to see to the application of the purchase-money in payment of the £800, and that, if the plaintiff thought fit to make unnecessary parties, the trustees ought not to pay the costs of such *parties, but that they must receive them from the [53] plaintiff. See also *Rogers v. Skillicorne*, Amb. 188 ; *Walker v. Flamstead*, 2 Ld. Ken., 2nd part, 57 ; *Dowling v. Hudson*, 17 Beav. 248.

In *Page v. Adam*, 4 Beav. 269, where a testator gave his real and personal estate to A., subject to the payment of his debts and certain annuities, it was argued, upon the authority of a dictum in the principal case, that annuity legacies charged upon land were different from other legacies, inasmuch as it was intended that they should continue a charge upon the land. However, Lord Langdale, M. R., held that A. could make a good title to the real estate without the concurrence of the annuitants, and that a purchaser from A. was not bound to see to the application of the purchase-money. "When," observes his Lordship, "an annuity is charged on land, and there is no devise for the payment of debts, and no general charge of debts, it must be deemed that the land was intended to be a constant and subsisting security for the payment of the annuity. But in the case of *Elliot v. Merryman*, where an expression to that effect is used, it was not considered, and the case did not require it to be considered, whether, in a case in which both debts and annuities were charged, the lands would be charged with the annuities in the hands of a purchaser from the person whose duty it was to sell for payment of debts, and the opinion of Lord Eldon, as stated in the note to *Jenkins v. Hiles*, 6 Ves. 654, n., is, 'that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money. It is just the same as if the specific bequests were out of the will.' Seeing no reason to differ from this opinion, and conceiving that an

annuity legacy charged on the estate is, in the sense here used, a specific disposition, subject to the payment of debts, I do not think that the rule ought to be departed from by reason of the nature of the legacy. The reason on which the rule is founded operates precisely in the same manner, whether the legacies are of annuities, or of sums of money; and it would occasion very great inconvenience, if no sale of estates for payment of debts charged thereon could take place without the authority of a Court of equity, if the author of the charge for payment of debts had also charged the estate with the payment of legacies in the form of annuities. There are one or two cases, (*Johnson v. Kennett*, 3 My. & K. 264; *Eland v. Eland*, 1 Beav. 235,) in which legacies of annuities have not been distinguished from other legacies; but, as the [*54] point was not raised in those cases, I think they are not to be *relied on as authorities on the present occasion. But it appears to me that, on principle, and for this purpose, there is no substantial difference between the two kinds of legacy. The charge of debts is general, the amount is indefinite, and may exceed the whole value of the estate. It is the first duty of the executor, and of the devisee of the estate which is subject to the charge, to pay the debts; and for that purpose he is entitled to sell: if he sells, something or nothing may be left to secure payment of the annuities. The purchaser seems to have nothing to do with this; he cannot know or ascertain the amount of debts, and cannot, if he would, protect the annuitant. His title is derived under an authority or right to sell for payment of debts—a purpose which is paramount to the payment of annuities; and in respect of debts he is not bound to inquire.” See *Johnson v. Kennett*, 3 My. & K. 624; *Eland v. Eland*, 1 Beav. 235; S. C., 4 My. & Cr. 420. And where there is a general charge of debts, it is immaterial that a particular debt is mentioned: *Robinson v. Lowater*, 17 Beav. 592, 5 De G. Mac. & G. 272.

Upon the same principle, in a recent case, where upon a dissolution of partnership the retiring partner by deed agreed to assign the partnership stock and effects to the partner continuing in the business, who covenanted to pay the debts and indemnify the retiring partner against them, it was held, by Sir John Romilly, M. R., that although the latter and his executors were entitled to pursue and specifically to apply towards the payment of the debts of the partnership any portion of the partnership property in the possession of the former, yet, as the case could not be put higher than one of an express trust to sell the property and apply the proceeds in payment of the debts of the partnership, they would not be entitled to do so while in the possession of a purchaser, even with notice of the deed, for he would not be bound to see to the application of the purchase-money. *In re Langmead's Trusts*, 20 Beav. 20.

Where there is a trust or charge for payment of debts generally and legacies, a purchaser, even after the debts have been paid, will not be liable to see to the application of the purchase-money in payment of the legacies: *Johnson v. Kennett*, 3 My. & K. 624; in this case the testator, subject to his debts and legacies, gave all his real and personal estate to his son absolutely, and the son thus became trustee for payment of debts and legacies, but, subject to the

charge, he was owner. The estate was then settled by the son, who afterwards sold it: Lord Lyndhurst, in reversing the decision of Sir L. Shadwell, V. C., observed, that it was said that the debts having been paid, [*55] *and paid out of the personal estate, and nothing remaining but the legacies, the case fell within the general rule applicable to cases where legacies alone were charged upon the real estate. He found no authority for such a proposition; the rule applied *to the state of things at the death of the testator*; and if the debts were afterwards paid, and the legacies alone left as a charge, that circumstance did not vary the general rule. In *Eland v. Eland*, 4 My. & Cr. 429, Lord Cottenham, speaking of the rule, as laid down by Lord Lyndhurst, says, "I entirely concur in that opinion, otherwise the mortgagee must in every case, in which there is a charge of legacies, ascertain whether the debts have been paid or not." See also *Page v. Adam*, 4 Beav. 269; and *Forbes v. Peacock*, 1 Ph. 717; in which case the testator charged his real estate with the payment of his debts, and directed it to be sold (but without saying by whom) upon the death of his wife, who was tenant for life, if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. The executors being thus empowered to sell the real estate, the surviving executor entered into a contract for that purpose with the defendant. Soon after the death of the widow (twenty-five years having elapsed since the testator's death,) the defendant, by his solicitor, inquired whether there were any debts due from the estate which remained unsatisfied; and, if not, whether the cestuis que trust would give authority to sell. To this question no answer was returned. Sir L. Shadwell, V. C., was of opinion that this, under the circumstances, amounted to notice to the purchaser that the debts were paid, and that he was therefore bound to see that the purchase-money was properly applied. See 12 Sim. 528. It followed, that the concurrence of the cestuis que trust was necessary to enable the purchaser to make a good title. Lord Lyndhurst reversed the decision of the Vice-Chancellor. "The estate," said his Lordship, "being charged in the first instance with the payment of debts, the defendant was not bound, according to the general rule, to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible: *Watkins v. Cheek*, 2 S. & S. 199; *Balfour v. Welland*, 16 Ves. 151; *Eland v. Eland*, 4 My. & Cr. 420. But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet, as the executor had authority to sell, not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, [*56] *this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case, then, comes to this: if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not. In the case of *Johnson v. Kennett*, where it was contended that the

rule did not apply, because the debts had been paid before the sale took place, I held that the rule *had reference to the death of the testator*; and, therefore, that even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule."

In a note by the learned reporter appended to *Forbes v. Peacock*, he says, "If, notwithstanding this decision, it should still be inferred from the terms of the dictum in *Johnson v. Kennett*, that the rule would not apply to a case in which it should happen that there were no debts due at the testator's death, and that the purchaser knew it, I have the authority of Lord Lyndhurst for stating that he did not intend, on that occasion, to lay down any rule which should govern such a case; and that the guarded and somewhat qualified terms in which the dictum is referred to and adopted in this case, were used for the express purpose of excluding that inference." See 1 Ph. 722, n. Lord St. Leonards, however, in *Stroughill v. Anstey*, 1 De G. Mac. & G. 635, 654, (after commenting upon *Watkins v. Cheek*, 2 S. & S. 199; *Johnson v. Kennett*, 6 Sim. 384, 3 My. & K. 624; *Page v. Adam*, 4 Beav. 269; and *Forbes v. Peacock*, 11 Sim. 152, 1 Ph. 717, 721,) with reference to what fell from Lord Lyndhurst in *Johnson v. Kennett* and *Forbes v. Peacock*, and the note of the reporter, makes the following useful observations. "I cannot think that, a satisfactory settlement of this important point. The difference is this:—Lord Lyndhurst represents the Vice-Chancellor as saying that if there be a general charge of debts and legacies, the purchaser is absolved from seeing to the payment of the legacies on account of the charge of debts, but if the charge of debts has been satisfied, and the purchaser knows it has been satisfied, he is then in the same situation as if there was only an original charge of legacies, and he is bound to see to the application of the purchase-money; but to this Lord Lyndhurst answers, that the rule is different, and that if there is a general charge of debts, the case must be taken as it stood at the death of the testator, and if there were debts then, although they were afterwards satisfied [*57] the purchaser is not liable. Then he says, *as I understand by the note, that he did not mean to decide that if there were no debts at the death of the testator, the purchaser was not bound. I cannot, however, follow that distinction. The case must stand upon one of two grounds: either that there are no debts within the knowledge of the purchaser (and then it is indifferent whether there were no debts at the death of the testator or no debts at the time of the purchase,) or (which is more satisfactory and open to no ambiguity,) on the ground that, when a testator by his will charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. That intention does not cease because there are no debts; it remains just as much if there are no debts, as if there are debts, because the power arises from the circumstance that the debts are provided for, there being

in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcilable, and all stand upon one footing, viz., that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule, on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarrass Courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this Court." 1 De G. Mac. & G. 652.

With reference to the ground upon which Lord Lyndhurst decided the case of *Johnson v. Kennett*, Lord St. Leonards said that it was not altogether satisfactory. "The son," said his Lordship, "being absolute owner of the estate, subject to the debts and legacies, was at liberty to settle it to uses for himself just as he thought proper, and when he sold, he sold as owner as well as trustee, and a sale was no breach of trust: it was a sale by him in his proper character, but still subject in equity to the payment of the debts and legacies. He stood in the same situation as an heir-at-law, who, being liable to the testator's debts, has power to dispose of the estate by sale, if he thinks proper, but is bound to apply the money that he receives from the sale in payment and satisfaction*of the debts, and this Court will compel him to do so, and will not allow him to divert the money to other purposes." See [*58] *Stroughill v. Anstey*, 1 De G. Mac. & G. 650.

In *Horn v. Horn*, 2 S. & S. 448, where a trader devised his estates, subject to the payment of legacies, it was contended, that, as the real estate of a trader was by 47 Geo. 3, c. 74, [repealed and re-enacted by 1 Will. 4, c. 47,] subject to debts generally, the purchaser was discharged from the obligation to see that his money was applied in payment of the legacies, as he would have been if the estate had been charged by the testator with payment of his debts. However Sir J. Leach, V. C., held, that the statute made no difference in this respect. The principle of this decision applies to 3 & 4 Will. 4, c. 104, which makes the real estates of all persons who die after the 29th of August, 1833, liable to simple contract debts. See *Shaw v. Borrer*, 1 Kee. 566, 577; *Ball v. Harris*, 4 My. & Cr. 268.

Although there is no trust for the general payments of debts, it will be implied that it was the intention of the settlor or testator to confer upon the trustees a power to give receipts where they are directed to sell at a time when the persons amongst whom they are to distribute the proceeds of the sale are either not ascertainable or not of age: thus, in *Balfour v. Welland*, 16 Ves. 151, where a general assignment for the benefit of certain scheduled creditors, and all other creditors executing the deed, was made to E. and F., upon trust, as soon as conveniently might be, to sell the assigned property, and with all convenient speed to make such dividends out of the proceeds among the creditors as therein mentioned; and the deed contained a provision limiting the time for creditors to execute the deed—*six months* for creditors in India, and

eighteen months for those in Europe, unless they were disabled by minority, in which cases the same periods were to be allowed respectively *after the disability had ceased*—upon an objection being taken by a purchaser from the trustees to the title of a leasehold house, on the ground that he was bound to see to the application of the money in satisfaction of the scheduled creditors and others coming within a limited time after the date of the deed, Sir William Grant, M. R., overruled the objection, upon the ground that the deed clearly conferred an *immediate* power of sale for a purpose that *could not be immediately defined*, viz. *to pay debts which could not be ascertained until a future and distant period*. “It is impossible,” observed his Honor, “to contend, that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed; and yet it could not be ascertained until the end of eighteen months who were the persons among [*59] whom *the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce, for the money could not be paid to any other person than the trustees. It is not material, that the objects of the trust may have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability cannot depend upon any subsequent event.” See also *Groom v. Booth*, 1 Drew. 548.

So, likewise, in *Sowarsby v. Lacy*, 4 Madd. 142, where A. devised certain lands to his children, the same to be sold when the executors and trustees of his will should see proper, and the purchase-money to be equally and severally divided amongst his children, some of whom were then infants, Sir J. Leach said, “It is plain the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and not capable of signing receipts. I must, therefore, infer, that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose.” See also *Lavender v. Stanton*, 6 Madd. 46; *Breedon v. Breedon*, 1 Russ. & My. 413; *Keon v. Magawly*, 1 D. & W. 401. If, however, an estate is charged with a sum of money payable to an infant on his attaining his majority, the purchaser will be bound to see the money duly paid: *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

Where money to arise from a sale is not merely to be paid to certain persons, but it is to be applied by the trustees upon trusts requiring care and discretion, the presumption arises that the settlor intended to confide the execution of the trust to the trustees solely, and the purchaser will not be bound to see to the application of the purchase-money. [*Sims v. Lively*, 14 B. Monroe, 433; *Wormley v. Wormley*, 4 Wheaton, 421.] Thus, in *Doran v. Wiltshire*, 3 Swanst. 699, the trustees were to receive the purchase-money, and to lay it out in lands to the uses of the settlement, and till that was done to invest it in the Government funds. Scott, Solicitor-General, urged that no good title could be made, because there was no clause in the settlement mak-

ing the receipt of the trustees a good discharge to the purchaser. But Lord Thurlow said, "As to the power which the trustees have of giving a discharge, it is true, that, when land is to be sold, and a particular debt is to be paid with it, the purchaser, is bound to see to the application of the purchase-money. But in cases where the application is to a *payment of debts generally, [*60] or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying that a purchaser is so bound; and, therefore, he conceived that the receipt of the trustees would be a good discharge in this case." See also *Balfour v. Wel-*
land, 16 Ves. 151. An authority given by a testator to trustees to lay out and invest money upon good security is an authority to do all acts essential to that trust, and necessarily, therefore, to give sufficient discharges to borrowers of that money. *Wood v. Harman*, 5 Madd. 368.

Upon the same principle, where the trusts of a term were to raise a sum of money, but there was no express authority to give a receipt for such sum, it was implied by the Court, from authority having been given to invest the money, and vary the investment. For "it is not reasonable," as observed by Sir J. Parker, V. C., "to suppose that the testator, giving the trustees authority to change the investments, and to convert them from time to time, had denied to them authority to receive the money." *Locke v. Lomas*, 5 De G. & Sm. 326, 329. Where, however, a testator gives a person like powers of sale and exchange as are contained in the will of another person, in which there are also powers to give receipts, the Court will not hold that such person has by implication a power to give receipts: *Cox v. Cox*, 1 K. & J. 251.

Where there is a charge for payment of debts generally, or a charge followed by specific dispositions of real estate, the purchaser is not bound to see to the application of his purchase-money; for, as before observed, the charge is equivalent to a trust, and the same effect will be given to it by a Court of equity, as if a direct devise had been made to trustees for payment of debts. See *Walker v. Smalwood*, Amb. 676; *Jenkins v. Hiles*, 6 Ves. 654, note; *Bailey v. Ekins*, 7 Ves. 323; *Dolton v. Hewen*, 6 Madd. 9. In *Shaw v. Borrer*, 1 Kee. 559, a testator, after commencing his will with words amounting to a charge of his real estate with payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and subject thereto, in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate, upon certain trusts, to other trustees, and appointed three executors, (who proved his will,) one of whom was his youngest son, and another, one of the trustees of the advowson. The personal estate being insufficient for the payment of debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson, before any vacancy had occurred in the living. In a suit *for specific perform- [*61]
ance by the plaintiffs, the trustees of the advowson and the executors, against the purchaser, it was held by Lord Langdale, M. R., that, the charge being in effect a devise of the real estate in trust for the payments of debts, a good title could be made by the plaintiffs, without the institution of a suit

to ascertain the deficiency of the personal estate, and that the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money." "In discussing an authority," observed his Lordship, "cited in *Jenkins v. Hiles*, Lord Eldon is reported to have said, that if a man by deed or will charges or orders an estate to be sold for payment of his debts, and then makes specific dispositions, the purchaser is not bound to see to the application; it is just the same as if the specific bequests were out of the will. It seems, therefore, clear, that a charge of this nature has been and ought to be treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts. If so, is there any good reason to doubt, but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors? Though the advowson is devised to trustees for special purposes, the testator has, in the first instance, charged all his estate with payment of his debts. The charge affects the equitable, but not the legal estate; and, upon the construction, the trusts of the will affect this estate, first, in common with the testator's other property for the payments of debts, and next, separately, for the special purposes mentioned in his will." In *Ball v. Harris*, 4 My. & Cr. 264, Lord Cottenham held, that a charge by will of real estates with the payment of debts generally, authorized a trustee, who was also executor, to whom, after imposing that charge, the testator had devised the estates, upon trust for other persons, to make a mortgage (being a conditional sale) of lands purchased under a power and conveyed to him upon the trusts of the will, and exempted the mortgagee from liability to see to the application of the mortgage money. "The real question," observed his lordship, "is, whether the decision in *Shaw v. Borrer* is right. I have carefully considered the judgment of the Master of the Rolls upon this point, and I entirely concur with him upon it; the point, indeed, has been long established. It arose directly in *Elliot v. Merryman*, and, as [*62] there laid down, has been recognized in the several cases referred *to by the Master of the Rolls; to which may be added the opinion of Lord Eldon in *Bailey v. Ekins*, and *Dolton v. Hewen*; for, although the point in some of those cases was, whether the purchaser was bound to see to the application of purchase-money, the decision that he was not assumes that the sale was authorized by the charge in the will of the debts, upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for payment of them." See also *Johnson v. Kennett*, 3 My. & K. 624; *Eland v. Eland*, 1 Beav. 235, 4 My. & Cr. 430; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 1 Ph. 717.

A purchaser is not bound to ascertain how much land it is necessary to sell for payment of debts, for, as observed by the Lord Keeper in *Spalding v. Shalmer*, 1 Vern. 303, "if more be sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser, for he is not obliged to

enter into the account ; and the trustees cannot sell just so much as is sufficient to pay the debts."

Where lands are devised to trustees upon trust to raise so much money as the personal estate shall fall deficient in paying the testator's debts and legacies, the purchaser is not bound to inquire whether the real estate is wanted or not. Secus, if the trustees have a power merely to raise money upon the deficiency of the personal estate, for unless there was a deficiency the power never arose, and consequently the purchaser would take no estate by the supposed execution of it. See *Culpepper v. Aston*, 2 Ch. C. 115, 223 ; *Dike v. Ricks*, Cro. Car. 335 ; *Pierce v. Scott*, 1 Y. & C., Exch. Ca. 257 ; Butler's note to Co. Litt. 290, b. ; *Bird v. Fox*, 11 Hare, 40.

The rule, that a purchaser is not bound, where the debts are charged generally, to see to the application of the purchase-money, "is," as observed by Lord Cottenham, "subject to this obvious exception : that, if a purchaser or mortgagee is a party to a breach of trust, it can afford him no protection. One obvious example is, where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice of the fact that such is its object :'" *Eland v. Eland*, 4 My. & Cr. 427. See also *Rogers v. Skillicorne*, Amb. 189 ; *Watkins v. Cheek*, 2 S. & S. 199. So, where trustees, instead of selling under a power in a will, in a manner not authorized by the power, raise money by mortgage many years after the death of the testator, the mortgagee being party to a breach of trust, his security will be invalid. Thus, in *Stroughill v. Anstey*, 1 De G. Mac. & G. 635, where a testator by his will, after appointing three persons his executors, gave to them the residue of his personal estate, and directed *them or the other trustees to be appointed under the provisions contained in his will, to stand possessed of his residuary personal [*63] estate, upon trust at such time or times as to them should seem meet, to sell and convert into money all such part thereof as should not consist of money, and invest the produce in securities, and to stand possessed of the same, upon trust thereout to pay his funeral expenses and debts, and certain large legacies which he specified, and to stand possessed of the residue for his two sons equally ; and the will contained a clause which, according to the construction put upon it by the Court, empowered the trustees to give receipts. Sixteen years after the death of the testator, the then acting trustees of the will, who were not the executors, raised money upon a deposit of the title deeds of two leasehold houses, part of the testator's residuary estate. It was held by Lord St. Leonards, C., dismissing a claim filed by the mortgagees to enforce their securities, that inasmuch as the trusts of the will showed a conversion, out and out, of the testator's property to be absolutely necessary, the trustees were not authorized in raising money by mortgage. In giving judgment, his Lordship made the following important observations upon the subject, whether a power of sale authorizes a mortgage :—"The first question," said his Lordship, "is, whether a mortgage was or was not authorized by the trusts of this will. And in addressing myself to this point, it ought, I think, to be considered, that in a case where trustees have a legal estate, and are to perform a particular trust

through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances would justify the raising of the particular charge by a mortgage, it must be in some measure in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down, that in every case of a trust for sale to raise particular sums, a mortgage might not, under circumstances, be justified. As a general rule, however, there can be no difficulty in saying, that a mortgage under a mere trust for conversion, out and out, is not a due execution of that trust; and, looking at the nature of the property in the present case, which was leasehold, and which, as being varying property, would, as a matter of course, be directed to be converted into money, where, under a general gift, it was to go to different parties, having different interests, [*64] it is impossible to say that this Court could allow the *property to remain unconverted under an absolute trust for conversion out and out; and the trustees to deal with it, as if it were property that was to be enjoyed in specie. In the present instance, the trustees went on receiving the rents, and accounting to the persons who were entitled to the benefit of the purchase-money of the property producing the rents; and this was done where the will contained a trust that, with all convenient speed after the testator's death, the property should be converted out and out, not simply for the purpose of paying a charge, which might be more conveniently raised by a mortgage, but for the purpose of conversion. One of the objects of conversion was to pay debts; but there were other and final objects which rendered a conversion out and out absolutely necessary; namely, the dedication of the trust-moneys to raise particular sums according to the testator's will; and, therefore, to continue the property unconverted was to set aside the testator's will instead of executing the trusts of it; and if the trusts had been properly executed, the fraud which has been perpetrated could not have taken place." See also *M'Neillie v. Acton*, 4 De G. Mac. & G. 744; *Haldenby v. Spofforth*, 1 Beav. 390; *Raikes v. Hall*, cited 1 De G. Mac. & G. 646; *Mather v. Norton*, 16 Jur. 309; *Devaynes v. Noble*, 3 Jur. N. S. 707.

With reference to the distance of time that had elapsed from the death of the testator to the deposit of the deeds, his Lordship observed, "That people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire, and look fairly at what they are about. I do not mean to encumber or to lessen the security of purchasers or mortgagees under trusts; but if for a great number of years a trust, such as that here, remains unperformed, and parties are found in possession and receipt of the rents of the trust-property, and then an application is made of it without their concurrence by the trustees, it may place those who deal with the trustees in a situation of having it established that there was a breach of trust, of which they ought to have taken notice."

Another exception is, where the purchaser has notice of a suit having been

instituted, which takes the administration of the estate out of the hands of the trustee: *Lloyd v. Baldwin*, 1 Ves. 173; *Walker v. Smalwood*, Amb. 676.

It may be here mentioned, that a question may arise of this nature: assuming that trustees for sale have no power to give receipts, can they, by conditions of sale, compel a purchaser to be satisfied with their receipts alone? It seems that they can, (*Groom v. Booth*, 1 Drew. 548,) unless the conditions *are framed so as to mislead the purchaser, (*Ib.* p. 565;) or the Court would, by enforcing specific performance, cause a breach of trust, (*Ib.*;) [*65] at all events, it would be too late to take an objection to such a condition on exceptions, after a decree for specific performance, and the usual reference as to title. *Wilkinson v. Hartley*, 15 Beav. 183.

The difficulty arising from the absence of a receipt clause may sometimes be got rid of by payment of money into Court under the Trustee Relief Acts, (see *Cox v. Cox*, 1 K. & J. 251;) but the application of this relief to the cases under consideration is doubtful; and it has been decided that the purchaser of an estate subject to a pecuniary charge cannot avail himself of these Acts. *In re Buckley's Trust*, 17 Beav. 110.

2. *As to Purchasers of Personal Estate from Executors or Administrators.*—However personal estate may be bequeathed, it must be applied, in the first place, by the executors for payment of the debts of the testator, in a due course of administration. Upon the same principles, therefore, by which a purchaser of real estate, devised for the general payment of debts, is exempted from seeing to the application of the purchase-money, it is a general rule that a person who purchases or takes a mortgage of leaseholds or other personalty from an executor or administrator is not bound to see to the application of the purchase-money. "After the sale is made, the creditors cannot," as observed by the Master of the Rolls in the principal case, "break in upon it." See *Bonney v. Ridgard*, 1 Cox, 145; *Scott v. Tyler*, 2 Dick. 725; *Mead v. Orrery*, 3 Atk. 240; *Andrew v. Wrigley*, 4 Bro. C. C. 125; *M'Leod v. Drummond*, 17 Ves. 154; *Keane v. Robarts*, 4 Madd. 357; *Ward v. Ward*, 4 Ir. Ch. Rep. 215; *Humble v. Bill*, 2 Vern. 444. The last-mentioned case, however, was reversed in the House of Lords, under the name of *Savage v. Humble*, 3 Bro. P. C. 5, Toml. ed., in the opinion of subsequent judges erroneously: *Ewer v. Corbett*, 2 P. Wms. 148; *Andrew v. Wrigley*, 4 Bro. C. C. 136.

The sale or mortgage of a chattel by an executor will be good against both the residuary, pecuniary and specific legatees, as well as the creditors of the testator, whose remedy, in case of the misapplication of the money by the executor, will be not against the purchaser or mortgagee, but against the executor; nor will notice of the will or of the bequest contained in it be prejudicial to the purchaser or mortgagee. See *Burting v. Stonard*, 2 P. Wms. 150; *M'Leod v. Drummond*, 17 Ves. 163, 169; *Andrew v. Wrigley*, 4 Bro. C. C. 125; *Keane v. Robarts*, 4 Madd. 332, 357.

In *Ewer v. Corbett*, 2 P. Wms. 148, one possessed of a term for ⁴years devised it to A., and died indebted, having made B. his executor. The [*66] executor sold the term, upon which the legatee of the term brought a bill against

the purchaser, insisting that, the term being bequeathed to the plaintiff, the executor was but a trustee, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust. However, Sir J. Jekyll, M. R., observed, "I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy but against the executor to recover the value thereof, if there be sufficient assets for the payment of debts. As for the notice of the will and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice; so that if notice were to be an hindrance, then, of consequence, no executor might sell. It is not reasonable to put every purchaser of a lease from an executor to take an account of the testator's debts, nor has he any means to discover them. On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (inter alia) of necessity be liable, and therefore may be sold by the executor. If equity were otherwise, it would be a great hindrance to the payment of debts and legacies, and would lay an embargo upon all personal estates in the hands of executors and administrators, which would be attended with great inconvenience." See also *Humble v. Bill*, 2 Vern. 445; *Watts v. Kancie*, Toth. 77.

The fact that a mortgage of part of the assets has been made to secure a debt originally contracted on the personal security of an executor, and without reference to the assets is immaterial. See *Miles v. Durnford*, 2 De G. Mac. & G. 641, in which the Lords Justices differed as to this point from Sir R. T. Kindersley, V. C. (See 2 Sim. N. S. 234.) "The only evidence," said Lord Justice Knight Bruce, "is that the advances were originally made without security, and that security was afterwards added. That is a circumstance deserving attention, but it does not go far. It is not inconsistent with probability that the advances were made for a purpose for which the executor might properly borrow as executor. I think the presumption is in favor of the propriety of the transaction, and that the plaintiff wholly fails." See also *Haynes v. Forshaw*, 11 Hare, 93.

An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power to sell and give [*67] receipts for the *purchase-money. See *Russell v. Plaice*, 18 Beav. 21. "The power of sale," said Sir John Romilly, M. R., in that case, "given to a mortgagee must, I think, be considered, not as the delegation of a power entrusted to the executor, which is a power to sell for the benefit of his cestui que trust, but as the creation of a new power to sell, not for the benefit of the person interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual; and I think that the right to create this power is incidental to the authority of the executor to mortgage. If this were withheld, the persons interested in the assets would be injured, because in that case, a mortgage could not be effected, unless on terms less advantageous than could be obtained, if the person advancing his money obtained the same security as if he was

dealing with the absolute owner of the estate. For the purpose of selling the estate of the testator, the executor is considered as the absolute owner, and has all the power incidental to that character. On what principle can it be maintained that he is not to be regarded in the same light, and to have the same power, for the purpose of effecting a mortgage, which may be the most beneficial course to be adopted for his *cestui que trust*, and of which benefit the executor is constituted the sole judge?" But it has been decided, that although trustees of chattels, with power to mortgage only, can give a power of sale to a mortgagee, they cannot give such power as to real estate. *Clarke v. Panopticon*, 3 Jur. N. S. 178.

If there be a specific legatee of a chattel, it is desirable to have his concurrence to a sale of it, as the executor may have done some act amounting to an assent, (*Thomlinson v. Smith*, Rep. temp. Finch, 378,) but the difficulty does not arise when he is also executor. (*Cole v. Miles*, 10 Hare, 179; *Taylor v. Hawkins*, 8 Ves. 209; *Attorney-General v. Potter*, 5 Beav. 164.)

If the executor or other person who by reason of a charge of debts and legacies could make a good title, convey to the devisee or other person entitled to the property subject to the charge by deed, reciting the payment of the charge, out of the personal estate, a purchaser from such devisee or other person will not be bound to see to the application of the purchase-money. *Storry v. Walsh*, 18 Beav. 559; see also *Forshaw v. Higginson*, 26 L. J. N. S. Ch. 174.

The Master of the Rolls, in the principal case, mentions two exceptions from the rule. As to the first, he observes, "that personal estate may be clothed with such a particular trust, that it is possible the Court, in some cases, may require a purchaser of it to see the money rightly applied." This observation has been approved of by *Lord Kenyon, M. R., in *Bonney v. Ridgard*, [68] 4 Bro. C. C. 130; 1 Cox, 145. See *McLeod v. Drummond*, 17 Ves. 161, 162. There seems, however, to be no decision upon this point.

The second exception from the rule, mentioned by the Master of the Rolls, is, where there is a fraud in the case on the part of a purchaser or mortgagee, which fraud will be inferred in many instances. Thus, where an executor disposes of or pledges his testator's assets in payment of or as security for a debt of his *own*, the person to whom they are disposed of or pledged will take them subject to the claims of the creditors, specific and general legatees, of the testator: thus, in *Hill v. Simpson*, 7 Ves. 152, Simpson, an executor, immediately after the death of his testatrix, Mrs. Smith, transferred certain funds standing in the name of John Smith, her deceased husband, to whom she was executrix, and other funds standing in her name and in the name of her co-executor, to Moffatt & Co., his bankers, as a security for such sums as he then owed, or might afterwards owe them. Moffatt & Co. denied that they knew, or suspected, that the funds were not at the time of the transfer the absolute property of Simpson, as executor or devisee of Mrs. Smith; or that they were part of the personal estate of John Smith; on the contrary, they believed they were Simpson's own property; and he represented to them that he was absolutely entitled thereto subject only to an annuity of 20*l.* to Elizabeth Smith's

sister during her life, and to a few very small legacies; that he had full right to dispose thereof, and would have disposed thereof but for the low price of the funds, which he expected would rise. They also stated that they did not know any of the legacies of John Smith to the plaintiffs, or any other person, were unpaid. However, Sir W. Grant, M. R., held that the general legatees could follow the funds transferred to the bankers. "In this instance," observed his Honor, "the assignment was made in less than a month after the death of Mrs. Smith. There is not, therefore, the least ground for the presumption of right acquired to the assets of Mr. or Mrs. Smith, by payments made in that short interval on account of either estate. It is not pretended it was to satisfy any claim on either estate; for the express purpose appears to have been to secure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his then actually outstanding. They had distinct notice, therefore, that the money was not to be applied to any demand upon either estate; but the assets were to be wholly applied to the private purposes of the executor. Allowing every case to remain [*69] undisturbed, does it follow from any, that an executor* in the first month after the testator's death can apply the assets in payment of his own debt; and that a creditor is perfectly safe in so receiving and applying them, provided he abstains from looking at the will, which would show the existence of unsatisfied demands? I am for the moment keeping out of sight the representation made by Simpson, and supposing the question to be, whether an executor may thus deal and be dealt with; and it is clear, no rule of justice permits, or of convenience requires, that he should have this unbounded power. Though it may be dangerous at all to restrain the power of purchasing from him, what inconvenience can there be in holding, that the assets, known to be such, should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to sell the assets; but it is not essential that he should have the power to pay his own creditor, and it is not just that one man's property should be applied to the payment of another man's debt. . . . It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information which, without extraordinary neglect, they could not avoid receiving. No transaction with executors can be rendered unsafe, by holding that assets transferred under such circumstances may be followed." See also *Haynes v. Forshaw*, 11 Hare, 93; *Wilson v. Moore*, (1 My. & K. 337.)

A different doctrine appears to have formerly prevailed in *Mead v. Orrery*, 3 Atk. 235, and *Nugent v. Gifford*, 1 Atk. 463. The authority of these cases, however, is weakened, if they are not completely overruled, by *Hill v. Simpson*; and see *Bonney v. Ridgard*, 1 Cox, 145, where Sir Lloyd Kenyon, M. R., in commenting on *Mead v. Lord Orrery*, says, that, if it had come before him, he should have decided it in direct opposition to that authority. It may be remarked, however, that in *Nugent v. Gifford* the executor was the sole residuary legatee; and in *Mead v. Lord Orrery* he was one of the

residuary legatees, and his co-executors joined with him in the assignment. If, therefore, these cases are rightly decided, they seem to establish, that where an executor is also residuary legatee, fraud or collusion will not necessarily be inferred as against the person to whom he sells or mortgages a chattel of the testator's in payment of or as a security for his own debt. See *M'Leod v. Drummond*, 17 Ves. 163, 164; *Bedford v. Woodham*, 4 Ves. 40, note.

It is clear, that, in the absence of fraud or collusion, the assignment by an executor, as a security for his own debt, of a chattel *specifically [70] bequeathed to him, will be good: *Taylor v. Hawkins*, 8 Ves. 209. A purchaser, however, with notice of the testator's debts being unpaid, will not be allowed to retain a chattel obtained from an executor as a security for his own debt, although the executor is also specific or residuary legatee; thus, in *Crane v. Drake*, 2 Vern. 616, where the purchaser, with notice of the plaintiff's debt, bought a lease from the executor and devisee, upon an arrangement that part of the purchase-money was to go in payment of a debt due to him from the executor, it was held that the sale was not binding upon the plaintiff, the Lord Chancellor saying, "The defendant was a party, and consenting to and contriving a devastavit." In commenting on this case, in *Andrew v. Wrigley*, 4 Bro. C. C. 139, Lord Alvanley, M. R., observes, "Can there be a stronger case of a devastavit, than an executor aliening the property of his testator to pay his own debts, and the alienee then knew that the plaintiff's debt was due." See also *Nugent v. Gifford*, 1 Atk. 464; *M'Leod v. Drummond*, 17 Ves. 163.

So, where the executor has sold for an under-value, or to one who has notice that the testator had left no debts, or that all debts had been paid, a sale or mortgage of the personal estate by the executor will not be valid: *Ewer v. Corbet*, 2 P. Wms. 148; *Scott v. Tyler*, 2 Dick. 725; *Drohan v. Drohan*, 1 Ball. & B. 185; *Rice v. Gordon*, 11 Beav. 265; and see *Stroughill v. Anstey*, 1 De G. Mac. & G. 635.

The exceptions from the general rule, that a purchaser from an executor is not bound to see to the application of the purchase-money, have been well summed up by Lord Thurlow in *Scott v. Tyler*, 2 Dick. 725. "If," observes his Lordship, "one concert with an executor, by obtaining the testator's effects at a nominal price or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value."

Length of time and acquiescence, as in the principal case, will prevent creditors and legatees from asserting their claims against purchasers, although the sale by the executor was attended with suspicious circumstances of fraud, and à fortiori against mesne purchasers: *Bonney v. Ridgard*, 4 Bro. C. C. 138, cited in *M'Leod v. Drummond*, 17 Ves. 165; S. C., 1 Cox, 145. And the fact of the legacies being contingent will be no sufficient excuse for the legatees lying by when they have such an interest as will entitle them to know

[*71] what debts the testator *owed, and what part of his estate had been applied in payment of them: *Andrew v. Wrigley*, 4 Bro. C. C. 135.

In *Mead v. Lord Orrery*, 3 Atk. 235, Lord Hardwicke seems to think that residuary legatees are never permitted in any case to question the disposition which the executors have made of the assets—that creditors or specific legatees could only do so. However, in *Hill v. Simpson*, 7 Ves. 152, Sir William Grant decided that a mere pecuniary legatee could follow the assets into the hands of a third person. In *McLeod v. Drummond*, 17 Ves. 169, Lord Eldon concurred in the principle laid down by Sir William Grant. “I cannot conceive,” said his Lordship, “why a creditor and a specific legatee should be able to follow the assets, and not a pecuniary or residuary legatee.”

Whether a Charge of Debts Authorizes a sale of Real Estate by Executors.—The question has of late been much discussed, whether a general charge of debts upon real estate authorizes a sale by the executors. It is laid down broadly by Sir. L. Shadwell, V. C., in *Forbes v. Peacock*, (12 Sim. 541; overruled upon another point, 1 Ph. 717,) that “if a testator charges his real estate with payment of his debts, that, *prima facie*, gives his executor *power to sell* the estate, and to give a good discharge for the purchase-money.”

If the learned Vice-Chancellor meant, that such a charge gave a *legal* power to the executors to sell, the subsequent authorities render it necessary that his proposition should to some extent be modified.

The first case which it is important to notice is that of *Shaw v. Borrer*, 1 Keen, 559, there the will contained a general direction to pay debts, so expressed as to constitute a charge on all the testator's real estates; followed by a devise of a particular portion of the real estate to trustees for a special purpose, and a residuary devise of real estates for other special purposes. No suit had been instituted in equity to ascertain the deficiency of the personal estate to pay the debts; and the question was, whether the trustees and executors together could make a title to the purchaser of that part of the real estate which was devised to trustees for special purposes. It was argued, that such a sale could only be effected under the decree of a Court of equity for the administration of the testator's estate; but Lord Langdale, M. R., held that a good title could be made. “It seems to be clear,” said his Honor, “that a charge of this nature has been, and ought to be, treated as a trust, which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court [*72] would, in a suit to which the executors were parties, compel the *trustees, for special purposes, to raise the money requisite for the payment of the debts. If, so, is there any good reason to doubt but that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors?”

Shaw v. Borrer was approved of by Lord Cottenham in the case of *Ball v. Harris*, (4 My. & Cr. 264,) where he held that an executor, who was also trustee of the real estate for other persons, there being a general charge of debts, had power to sell or mortgage the estate. “I have,” said his Lordship, “carefully considered the judgment of the Master of the Rolls in *Shaw v*

Borrer upon this point, and I entirely concur with him upon it. The point, indeed, has been long established. It arose directly in *Elliot v. Merryman*, and as there laid down, has been recognized in the several cases referred to by the Master of the Rolls; to which may be added the opinions of Lord Thurlow and Lord Eldon in *Bailey v. Ekins*, (7 Ves. 319, 323,) and *Dolton v. Hewen*, (6 Madd. 9;) for although the point in some of those cases was, whether the purchaser was bound to see to the application of the purchase-money, the decision that he was not, assumes that the sale was authorized by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them."

Now, in the first of these cases, it will be observed that the trustees joined with the executors in the sale; and, in the second, that the executor was also trustee, so that as no difficulty arose with respect to the conveyance of the legal estate, a good title could be made; in the first case, by the trustees and executors; and, in the second case, by the executor acting in a double capacity alone.

In the case of *Gosling v. Carter*, 1 Coll. 644, the testator, after giving a *general direction* for payment of his debts, gave and bequeathed all his real and personal estate to his wife for life, with a direction to sell the same, and divide the proceeds after her decease; and he made his wife and another person executrix and executor. The executrix and executor sold the real estate by auction; and upon a bill filed by them against the purchaser, it was held by Sir J. L. Knight Bruce, V. C., that they had an implied power to sell the estate for payment of debts, but that the defendant ought not to be compelled to complete the purchase without a conveyance from the heir-at-law. "There is," said his Honor, "an implied power of sale, because the life interest of the wife is subject to the general charge for payment of debts; therefore, in a sense, and in a manner, there does exist a power of selling during the lifetime of the wife, *there being debts, which fact is proved. And I am [*73] of opinion, that there is upon this will an intention exhibited, that a sale, if made, should be made by the executors, or one of them, and not otherwise. The next question is, whether this intention is expressed so as to create a legal power? in which case, the concurrence of the heir-at-law would not be necessary. I am of opinion this question is one of too great nicety and difficulty to decide against the purchaser. If he wishes the concurrence of the heir, he must pay, or not pay, for the discovery of the heir, according to his contract. Upon that I give no opinion. But I think that in this suit he is not to be compelled to take the title from the executor and executrix without the concurrence of the heir. I decide, therefore, without prejudice to the question, whether the heir is, or is not, a necessary party to the conveyance, that the executor and executrix, as debts are admitted to have existed at the time of the sale, had power to sell." And see *Curtis v. Fulbrook*, 8 Hare, 25, 278.

The question was next considered at law in the case of *Doe d. Jones v. Hughes*, 6 Exch. 223; there a testator, after charging all his real and personal

estate with his debts, funeral and testamentary expenses, and a legacy therein mentioned, subject thereto, gave and devised the rents and profits of all his messuages, farms, and lands *except his Bala Houses* to his wife for life, with remainder over to another person in fee. And he also bequeathed to his wife the whole of his personal estates, and appointed her sole executrix. It was held by the Court of Exchequer that the executrix had no implied power to sell or mortgage the Bala Houses (which descended to the heir) for the payment either of the debts or of the funeral or testamentary expenses or legacy. "Upon the argument of this case," said Parke, B., "the several authorities upon the subject were brought before us; and it was contended on behalf of the defendant, that the effect of a charge of the real estates with debts was to give to the executrix an implied power of sale. But upon a due consideration of all the cases, it is perfectly clear that not one of them bears out that proposition. One class of cases shows, that by a devise to trustees of the real estate charged with the testator's debts, the trustees have thereby imposed upon them the duty of raising money to pay those debts; for, as the estate is given to them, they can, through the means of the estate, raise money for the payment of those debts. Another class of cases decides, that if from the whole purview of the will it appears to have been the intention of the testator that his real estate should be sold, and the proceeds of that real estate are to be distributed [*74] for the *purpose for which it is given, which the executors alone by law could perform, then there is an implied power given them by the will to sell the estate; and that the executor who is to distribute the money is to sell the estate. Several cases were cited which confirm this proposition, and amongst them is that of *Forbes v. Peacock*. But upon looking through the cases, not a single authority is to be found which says, that a *simple charge* of the estate with the payment of the debts does more than make a charge upon the estate in the hands of the devisee, if the estate is devised, or upon the estate in the hands of the heir-at-law, if the estate devolves upon him by the law of inheritance. . . . The estate is only subjected in the hands of the heir-at-law to a charge for funeral and testamentary expenses, and the charges attending the proof of the will, which the executrix must enforce through the medium of a Court of equity; and we therefore think the executrix had no power to sell or mortgage the estate. It is not within the principle of any of the cases in which it has been held there is an implied power of sale or mortgage."

The next case to be noticed, (apparently conflicting with *Doe d. Jones v. Hughes*), is the case of *Robinson v. Lowater*, (17 Beav. 592,) there a testator devised some messuages in Rutland Place to his daughter Elizabeth (since deceased) for life, with remainder to all her children living at her decease, and two closes in Sandfield to his son Richard for life, with remainder to the use of his children who should be living at his decease, as tenants in common, with a limitation over in the event of that remainder not taking effect. And he devised his estate at Arnold to his son Richard in fee charged with the payment of the sum of 200*l.* due on mortgage of his messuages devised to his daughter Elizabeth, and of the legacies therein mentioned, and with, and to

the payment of *his debts*, and funeral and testamentary expenses. But if his premises at Arnold should not be sufficient for that purpose, then he charged his closes at Sandfield with the payment of such deficiency; and he appointed his son Richard, sole executor of his will. The testator by a codicil revoked the devise of the Arnold property to his son Richard. The will was proved by the executor, who exhausted the personal estates in payment of debts, except the mortgage debt charged on Rutland Place. He also sold the two closes in Sandfield to Nathaniel Sulley, (in whom the legal estate in fee simple was vested as a trustee for the testator and his heirs). The purchaser had notice of the will. The defendant Lowater derived his title to Sandfield, from Nathaniel Sulley. The plaintiffs, the children of the testator's daughter Elizabeth filed a bill, *insisting that the Sandfield property was still liable [*75] in the hands of the defendant Lowater to pay off the mortgage on the Rutland place property, which still remained unpaid. The bill however was dismissed by Sir John Romilly, M. R., with costs. "The case of *Doe d. Jones v. Hughes*, (6 Exch. 223,) said his Honor, "is relied upon to show, that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery; amongst which I may refer to *Ball v. Harris*, (4 My. & Cr. 264,) where Lord Cottenham observes, that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them; *Forbes v. Peacock*, (12 Sim. 541,) which, on this point, is not affected by the reversal of the decision, (1 Ph. 717,) and to the case of *Gosling v. Carter*, (1 Coll. 644).

"Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised, gave the executors an implied power of sale, because, to use the expression of Sir J. Leach, in *Bentham v. Wiltshire*, (4 Madd. 49,) the power to sell is 'implied, from the produce having to pass through their hands in the execution of their office, as in the payment of debts or legacies.' I am of opinion, therefore, that a good title was made to the purchaser Nathaniel Sulley, and that the defendants claiming under him are entitled to hold it, discharged from all claims in favor of the plaintiffs." This decision upon appeal was affirmed by the Lords Justices, (5 De G. Mac. & G. 272). During the argument the Lord Justice Knight Bruce, with reference to *Doe d. Jones v. Hughes*, put the following pertinent question; "Does that case deal with anything beyond the question of *the legal estate*? Can it govern the present, which is an application to a Court of equity to give effect to a charge?" Again, Lord Justice Turner asked; "Does a charge of debts amount to a direction to institute a Chancery suit? Would not that consequence follow from holding that the executor could not sell?" In giving judgment, Lord Justice Turner made the following observations: "The question is, how and by whom the money was to be raised. The purpose for which it was to be raised being to pay debts, it must have been in the contemplation of the testator that it would have to be raised *immediately*, but no power is given to the devisees to raise it; and the will, containing a devise of a life estate, with contingent remainders over, it is impossible that during the sub-

sistence of those contingent remainders, the devisees could themselves raise it. On the face of this will, therefore, it was not the intention of the testator that [*76] *the money should be raised by the devisees. Then who was to raise it! Surely the persons who would have to apply the fund. It seems to me, therefore, upon the whole scope of this will, without reference to the cases decided upon the subject, that in this case, at least, it was the intention of the testator that the money should be raised by the executor; and if by the executor, then the executor must be considered as invested with all the powers necessary to raise it. I think there is abundant reason for the conclusion at which the Master of the Rolls has arrived in this case." See also *Eidsforth v. Armstead*, 2 K. & J. 333.

In *Wrigley v. Sykes*, 21 Beav. 337, a testator ordered all his debts, funeral, and testamentary expenses, and legacies "to be paid and discharged out of his real and personal estate." He then devised certain freehold messuages to trustees for a term of 500 years, upon the trusts thereafter mentioned, and subject thereto to his five sons in fee, as tenants in common, *upon condition* that they should pay, in equal shares, certain specified legacies and annuities, and also all his mortgage and *other debts*. The *trusts* of the *term* of 500 years were declared to be, that if any of the sons should, thirty days after demand, refuse to pay his proportion of the legacies, annuities, mortgage, and other debts, the trustees should, out of the rents, of the share of such son levy such sums unpaid, and all costs; and he appointed his five sons executors. Thirty-three years after the death of the testator, the surviving executors sold the estate, as they alleged, to pay the debts. Sir John Romilly, M. R., held that they had power to sell, and decreed a specific performance against the purchaser. "I do not think," said his Honor, "that the creation of the term, which has a distinct and specified object, supersedes the general charge for payment of debts; which, in my opinion, gives the executors a power of selling the estate for payment of debts. And in that view of the case, I am of opinion, that this is a valid contract. It is very true that the Court will not compel a person to take a doubtful title; but if the Court is of opinion, upon due consideration of the question of law, that the title is good, the Court is bound so to hold, and it cannot, in my opinion, decline to do so, because it is possible, that when the case arises between the parties, some other Court may come to an opposite or contrary conclusion; and, therefore, I am of opinion, that I am right, in this case, in compelling the purchaser to take what, in my opinion, is not a doubtful title. I shall certainly secure to the purchaser, as far as it is competent for the Court to do so, a good legal estate when the conveyance is [*77] made: but as I am *of opinion that the executors had power to enter into the contract, which is not disputed, and as, in my opinion, the title is good, I must decree specific performance."

The conclusion which may be drawn from these cases, seems to be this, that where there is a general charge of debts upon real estate, the executors have in *equity* an implied power to sell it, and they alone can give a valid receipt for the purchase-money, but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, (*Doe d. Jones v. Hughes*,

6 Exch. 223,) the persons in whom it is vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance. This conclusion reconciles all the cases in equity with the apparently conflicting authority of *Doe d. Jones v. Hughes*.

Hence it follows, that although real estate in the hands of an alienee of a devisee, or heir-at-law, where there has been *no charge* of debts by a testator, is discharged from the debts, and the heir or devisee only remains personally liable, (*Richardson v. Horton*, 7 Beav. 112; *Spackman v. Timbrell*, 8 Sim. 253; *Pimm v. Insall*, 1 Mac. & G. 449; *Kinderley v. Jervis*, 22 Beav. 1;) yet where there *is a charge of debts* upon real estate, a purchaser from the heir or devisee, or their alienee, cannot safely complete without either the concurrence of the executors, or without being satisfied that all the debts have been paid. See *Storry v. Walsh*; *Hope v. Liddell*, 25 L. J. N. S. Ch. 90.

The opinion among conveyancers, nevertheless, appears to be, that where, subject to a charge of debts, an estate is devised to persons either beneficially or as trustees for special purposes, a sale can be effected by them alone; and Lord St. Leonards, in the last edition of his work on Vendors and Purchasers, with reference to the cases of *Robinson v. Lowater*, and *Wrigley v. Sykes*, says, "They have introduced considerable difficulty upon titles, by implying a power of sale in executors from a charge of debts, although the estate is devised to others. This is contrary to the received opinion. It would not be safe to rely on the authority of these cases." See an article in the "Jurist," vol. ii., N. S. 68. Sugd. V. & P., 13 ed. p. 545, n. (1.) See also, "Dart's V. & P." 400, and an able note, p. 476, 3rd ed.

We must remember, however, that *Robinson v. Lowater* is stamped with the high authority of the Lords Justices of the Court of Appeal.

As to what constitutes a charge of debts, see note to *Silk v. Prime*, vol. 2, *post*.

The cases in this country on the foregoing subject, which are not numerous, may be distinguished into three classes: 1. Relating to sales of personal property by executors, guardians, and other trustees; 2. To sales of real estate under a power in a deed or will to sell for the payment of debts, legacies, or other charges; 3. To sales of real estate by trustees, in a settlement, in pursuance of a power to sell and re-invest. In regard to all of these, it may be considered as the prevailing doctrine in the American courts, that a purchaser from a trustee

is not bound to see to the application of the purchase-money, except where the sale is a breach of trust on the part of the trustee, and the purchaser has, either from the face of the transaction itself, or *alibunde*, notice or knowledge of the trustee's violation of duty: but if he has such knowledge or notice as makes him a party or privy to the trustee's misconduct, the property will be affected in his hands with the trusts which previously attached to it. This may be considered as established in respect to sales for the payment of debts generally, and sales for payment

of debts and legacies, and to sales for reinvestment; *Rutledge v. Smith*, 1 Busbee's Eq. 127; *Lening v. Peyton*, 2 Dessausure, 378; *Sims v. Lively*, 14 B. Monroe, 433; and though perhaps not expressly decided in the case of sales under a charge for certain specified debts, yet the principles acted upon by the courts seem to cover that ground; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 213. See the subject discussed at length in *Garnett, &c. v. Macon et al.*, 6 Call. 309, 354; S. C., 1 Brook. 185, &c.; and see also *Jackson et al. v. Updegraffe et al.*, 1 Robinson's Virginia, 107, 120.

1. *In regard to sales of personal property by an executor, guardian, or other trustee.*—The liability of a purchaser of a testator's assets from his executor was carefully examined by Chancellor Kent in *Field v. Schieffelin*, 7 Johnson's Chancery, 150, 160. After a review of the English cases, he concludes as follows:—"They all agree in this, that the purchaser is safe, if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact by the very transaction, applying them to the extinguishing of his own private debt. The great difficulty has been, to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding, that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and the better doctrine is, that in such a case, he does buy at his peril; but that, if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the

inquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust." And this principle was applied in that case to a purchase from a guardian. In like manner, in *Petrie v. Clark and others*, 11 Sergeant and Rawle, 377, 385, where the right of creditors and legatees, to follow assets that have been collusively parted with by an executor, was examined by Gibson, J., the principle was declared, that such a right did not exist at law, for the executor is the owner of the legal title to the goods, and may dispose of them by any species of voluntary alienation by which he may dispose of his own, but that equity gives relief on the ground that the executor, though complete owner of the legal title, is *quasi*, a trustee for creditors and legatees, and that it will follow assets into the hands of any one who is not a purchaser for *valuable consideration*, or who having paid a *valuable consideration*, has been *guilty of fraud and collusion with the executor*; and that an executor's applying the assets in payment of his own debt, is of itself a circumstance of suspicion, which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction.

[The purchase must be in good faith, and for value, to discharge the purchaser, and he will be answerable whenever there is a want of valuable consideration, or sufficient ground for inferring *mala fides*. Hence, a sale or pledge as security or payment for the antecedent debt of an executor will be invalid, if the party to whom it is made knows that the property belongs to the estate: *Williams v. The Branch Bank*, 7 Alabama, 906; *Dodson v. Simpson*, 2 Randolph, 294;

Williamson v. Morton, 2 Maryland, Ch. 94; *Wilson v. Doster*, 7 Iredell's Eq. 231; *Miller v. Williamson*, 5 Maryland, 219; while a pledge must fail for want of a sufficient consideration, even if he acts in ignorance, (*Petrie v. Clark*), and under a mistaken belief that it belongs to the executor, *Hertell v. Bogert*, 11 Paige, 57; *Garrard v. The Railroad*, 5 Casey, 154: a precedent debt not being in itself a valuable consideration, although such a consideration may, as it would seem, grow out of its suspension or extinguishment; 2 Am. Lead. Cases, 184, 4th ed.; *post*, note to *Bassett v. Nosworthy*. But a pledge for a contemporaneous advance will, as it seems, be good, if free from fraud, *Tyrrell v. Morris*, 1 Dev. & Bat. Eq. 559; *Williamson v. Morton*, 2 Maryland, Ch. 94, 100; *Mills v. Durnford*, 13 English Law & Equity, 123, 124. Fraud will be presumed in equity, if not at law, whenever the purchaser knows, or has such notice as is equivalent to knowledge, that the property belongs to the estate, and that the executor is applying, or means to apply, the proceeds of the sale to his own use: *Sacia v. Borthoud*, 17 Barbour, 15; *Miller v. Williamson*; *Williamson v. Morton*. And the same rule will apply in every instance, where those who are entrusted with the possession and control of the property of others, as trustees or agents, seek to use or appropriate it for their own purposes, in fraud of the trust; and preclude a recovery against the *cestui que trust*, unless value has been given in ignorance of the fraud, and without such means of knowledge as amount to actual or constructive notice of its existence: *Garrard v. The Rail Road*, 5 Casey, 154;

The Rail Road v. Barker, Ib. 160. But the bad faith of an executor or his misappropriation of the purchase-money, will not invalidate the title of the purchaser, unless it is in some way brought home to the purchaser at or before the final completion of the sale, by delivery and payment: *Hortell v. Boyert*, 9 Paige, 59; *Bond v. Ziegler*, 1 Kelly, 324; *Wilson v. Doster*, 7 Iredell, Eq. 231; *Polk v. Robinson*, Id. 235; *Pipkin v. Casey*, 13 Missouri, 347; *Williamson v. Morton*, 2 Maryland, Ch. 94, 103. In like manner, the purchase of partnership property from one or more of the partners, without the concurrence of the rest, does not render it necessary to see that the purchase-money is applied to the use of the firm, even when the purchase is made from a surviving partner, and consists of real estate belonging to the partnership, and consequently charged with a trust for the estate of the deceased partner, and through him for the joint creditors of the partnership, *Tillinghast v. Champlin*, 4 Rhode Island, 173, 213. But if the purchaser is, or ought to be, aware that the sale is made in fraud of the duty of the surviving partner, to administer the assets fairly for the benefit of all concerned, or with a view to a fraudulent use of the proceeds for his private purposes, he will become *particeps criminis*, and be liable to those whom he has aided to injure: *Hoxie v. Carr*, 1 Sumner, 193; *Dyer v. Clark*, 5 Metcalf, 580; *Tillinghast v. Champlin*; and it would seem that such participation will be implied from the mere fact of accepting a conveyance from a surviving partner of his legal title, as tenant in common, with notice that it is partnership property, and that

the partnership is insolvent; because, under these circumstances, the vendor has nothing which he is, or can be, entitled to convey as his own, and is bound to make or concur in a sale of the property, as a whole, to the best advantage, and apply the proceeds to the payment of the debts of the firm: *Champlin v. Tillinghast*; *Hoxie v. Carr*; *Tapley v. Butterfield*, 1 Metcalf, 515; 1 American Leading Cases, 499, 4th ed.]

2. *In regard to sales of real estate under a power to sell for payment of debts or legacies.*—It is universally agreed, that upon a sale of lands under a charge or trust for the payment of debts generally, the purchaser is not bound to see to the application of the purchase-money; *Gardner et al. v. Gardner et al.*, 3 Mason, 178, 218; *Potter v. Gardner*, 12 Wheaton, 498; *Laurens v. Lucas*, 6 Richardson, Eq. 217; *Williams v. Otey*, 8 Humphreys, 568; *Hauser v. Shore*, 5 Iredell, Eq. 357. It seems to be equally clear, that where the trust is for the payment of debts generally, and also for the payment of legacies, the purchaser is not bound to see the money applied, upon a sale made for the payment of legacies; because, to hold that he is bound to see the legacies paid, would in fact involve him in the account of the debts, which must first be paid; *Grant v. Hook*, 13 Sergeant & Rawle, 259, 262; *Cadbury v. Duval*, 10 Barr, 265; *Andrews v. Sparhawk*, 13 Pickering, 393, 401; *Sims v. Lively*, 14 B. Monroe, 435; see also *Bruch v. Ihrie*, 2 Rawle, 392, 417. And it would seem also, that under a devise for the payment of legacies, the purchaser is not bound to see to the application of the purchase-money, because, by the law, the debts, generally,

must be first paid; though there is a dictum to the contrary in *Grant v. Hook*: and in *Hannum et al. v. Spear*, 1 Yeates, 553; S. C., 2 Dallas, 291, it was held that when land was sold under a devise for the payment of legacies, it was subject in the purchaser's hands to the lien of debts. With regard to the case of a trust or charge for the payment of certain specified or scheduled debts, there are *dicta*, indeed, recognizing a distinction between it, and the case where the devise is for the payment of debts generally; *Gardner et al. v. Gardner et al.*, 3 Mason, 178, 218; *Duffy v. Calvert*, 6 Gill, 48; *St. Mary's Church v. Stockton*, 4 Halsted, Ch. 520. But though such a distinction is reasonable in England, where, without a power or charge created by will, lands are not a trust in the hands of executors for the payment of debts, yet in this country, where, generally, if not universally, the law affects the lands of a decedent, with a charge or trust for the satisfaction of his debts, which is paramount to any specific charge in his will, this distinction appears to be inapplicable. In principle, it would seem, that in those states in which lands are subject to be sold by an executor, under an order of court, for the payment of a testator's general debts, a charge or appropriation, by will, of lands to certain specified debts, is without operation or effect in regard to the present purpose; because, it must be subordinate to the charge and appropriation which the law makes, independently of the devise, and in all cases alike the money must be disposed of, not according to the will of the testator, but according to law: and see the remarks of Wilson, P., in *Cryder's Appeal*, 1 Jones, 72,

74. Under such a system, the purchase-money is not to be paid directly to the creditor specified by the testator, but must come into the accounts of the executor, and be disposed of under the direction of the court having jurisdiction of the accounts; and, of course, the purchaser is not to follow it through the court. Wherever the law creates a general trust of lands for the payment of debts, collateral and paramount to the special appropriation made by the testator, the case becomes similar to that considered in the preceding note, of a general charge by will for payment of debts followed by a specific disposition, as in the cases *Jenkins v. Hiles*, 6 Vesey, 654, n., and *Shaw v. Borrer*, 1 Keen, 559. These views are sustained by the reasoning in *Grant v. Hook*, and the conclusion seems to be inevitable, that upon a sale under a testamentary charge or trust for the payment of specific or scheduled debts, in those states in which the lands are by law subject to be sold by executors for the payment of debts, the purchaser is not bound to see to the application of the money, because the application is not to be according to the schedule or specification fixed by the testator, and under the direct intervention of the purchaser, but according to the law which regulates the priority of debts, and under the control and supervision of the court. It is well settled that a purchaser under a decree of a court has no concern with the disposition which the court may make of the purchase-money, nor can his right as a purchaser be affected by any misapplication which he may make of it; *Coombs v. Jordan*, 3 Bland, 284, 329; *Wilson, &c. v. Davisson*, 2 Robinson's Virginia, 385, 412. The

case is not materially different where the power is given to a testamentary trustee, and not to the executor; a purchaser, if he undertook to see to the application of the purchase-money, would still be involved in the accounts of the estate. A trust for payment of particular debts, is much less specific and immediate than in the instance of a sale of trust property for re-investment; and the cases, under the next head, which hold the purchaser, there, to be liable only where there is collusion, appear, *a fortiori*, to determine this point.

But though, under a devise for the payment of debts generally, the purchaser who pays the purchase-money to the person authorized to sell, is not bound to look to its application, there can be no doubt that if the purchase-money is misapplied with the co-operation of the purchaser, or if he be directly or indirectly *particeps criminis*, he remains liable to the creditors for the sum so misapplied; *Potter v. Gardner*, 12 Wheaton, 499, 502; *Clyde v. Simpson*, 4 Ohio, N. S., 445, 464.

In Pennsylvania, by statute of Feb. 24, 1834, s. 19, in case of sales of a decedent's estate by an executor for any purpose, the purchaser may pay his money into the Orphans' Court, or with leave of that court, to the executor, and the payment shall be valid against all persons.

[Whatever the rule may be when land is sold by an executor or trustee, for the benefit of creditors, and when the proceeds are consequently primarily applicable to the payment of debts, although the sale may be made professedly for a different purpose, there can be little doubt that a sale by a devisee or grantee, solely for the pay-

ment of legacies, or other specific charges on the land, will make it the duty of the purchaser to see to the application of the purchase-money, unless there is something special in the circumstances of the case to exonerate him from the burden, and throw the whole responsibility on the vendor. Thus, where land which had been devised to one Simpson, subject to, and charged with, certain legacies, was sold by Simpson, with the view of paying a debt for which he had mortgaged the land to Clyde, the Court said, that the purchaser, Miller, was bound to see to the application of the purchase-money, and that he consequently would have been answerable to the legatees, even if he had not been aware of the intended misappropriation of the proceeds of the sale by Simpson; and the case must, consequently, be considered as an authority for the former point, although it might have been decided solely on the latter; *Clydev. Simpson*, 4 Ohio, N. S., 445. "It is certain," said Ranney, J., in delivering the opinion of the court, "that Simpson was invested with a power to sell the property devised, (8 Sim. R. 485; Myl. & Cro. R. 264; 1 Kee. 559;) and that no distinction is to be taken between estates devised in trust, or those only charged with the payment of debts or legacies; 2 Sug. on Vend. 38; 2 Story's Eq. sec. 1127; 7 Ves. jr. 323. But, in either case, the general rule undoubtedly is, wherever the trust or charge is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but whenever the trust is of a general and unlimited nature, he need not see to it: 2 Story's Eq. sec. 1129; 2 Sug. on

Vend. 32; *Murray v. Ballou*, 1 Johns. Ch. R. 556.

"In the application of this rule, it has been generally held, that where the trust is created, or the charge imposed, for the payment of a portion; a mortgage, legacies, or scheduled debts, which are definitely ascertained and to be paid over immediately to the person entitled, the purchaser, in the view of a Court of equity, is bound to see that the money is actually applied to their discharge before the estate is relieved from the burden. But where the trust is created, or the charge exists, for the payment of debts generally, or for the payment of debts and legacies, when an account of the debts necessarily precedes the payment of the legacies; or, where the money is to be reinvested or otherwise applied by the trustee to the purposes which require time, deliberation, and discretion on his part, the purchaser is relieved from such responsibility, and *cestui's que trust* must look alone to the trustee.

"I am aware, that several eminent judges have been of opinion, that a purchaser is in no case bound to see to the application of purchase-money, where the deed or will has designated the person to receive it; and that a power to sell necessarily includes the incidental power to give a valid discharge for the purchase-money; and Mr. Powell has defended the same opinion, with much ingenuity and force; 1 Pow. on Mort. 312. But the general course of decision has clearly been otherwise.

"In this case, the amount of the legacies, and the persons to receive them, are distinctly defined in the will; and they were entitled to payment as soon as the time fixed in the

will arrived. There is probably nothing to relieve it from the operation of the general principle; but it does not need the aid of that principle. There never has been any difference of opinion that if the purchaser knew that the sale involved a breach of trust, or that the money was not to be applied in payment of the debts or legacies charged upon the estate, he would be compelled to hold the property subject to the charge: 2 Sug. on Vend. 39; *Watkins v. Cheek*, 2 Sim. & Stu. 199; *Wormley v. Wormley*, 8 Wheat. 421; *Gardner v. Gardner*, 3 Mason, 178.

"Now, at the time Miller made his purchase, he was fully aware, not only in fact, but from the notice furnished by the *lis pendens*, that the legacies were not paid, and that no part of the money received from Clyde had been applied to that purpose; while he advanced his money to pay off Clyde, and denied the existence of any lien in favor of the legatees. He participated in the breach of trust, and after finding himself mistaken as to the lien, he stands upon no ground to insist that it has been discharged."

When, however, the interests of the beneficiaries under a trust, growing out of a devise of land to be sold, or subject to a power of sale, are left uncertain by the testator, and depend for certainty, either as to amount or time of payment, on the choice or discretion of the devisee, the purchaser will be freed from responsibility, by payment to the latter, and will not be answerable for the execution of a trust which he has no express or implied power to superintend or control; *Steele v. Livesay*, 11 Grattan, 454.]

3. *Where a sale is made by a trustee under a power to sell and re-invest*

upon the same trust.]—In *Living v. Peyton*, 2 Dessaussure, 375, a marriage settlement authorized the *cestuis que trust* to sell the lands to any person they pleased, provided the proceeds should be immediately laid out and vested in the purchase of some other estate of equal value, to be secured upon the same trusts; and a purchaser under this power submitted to the court whether it was his duty to see to the appropriation of the consideration-money to the purposes of the trust estate. "Whatever may be the law in Great Britain on this subject," said Chancellor Rutledge in delivering the decree, "there are a variety of local circumstances which render it not only highly improper, but almost impracticable that it should be adopted in this country. The case before us proves the position, for scarcely would a purchaser be found of trust estates who would be inclined to be saddled with the inconvenience and embarrassment of seeing that the purchase-money was applied to the purposes of the trust. It has never heretofore been determined that he should, and we will not now establish a precedent, for it might tend exceedingly to embarrass, if not shake to the foundation, the titles of very many persons who have heretofore purchased at the sales of the trust estates without the remotest idea of responsibility, as to the application of the purchase-money. We do not say that where property has been conveyed in trust for the payment of debts, or other specific purposes, that it is not the duty as well as the interest of purchasers at such sales to attend to the right appropriation of the money; but in cases like the present, and others that may be assimilated to it, purchasers are not,

and ought not to be considered in the same light as trustees, and intrude themselves on the parties to see that the purchase-money is applied as the trust deed directs, because the *cestui que trust* joining in the conveyance with the trustee, it is his particular duty as well as his interest to see the trust money properly applied, and if he finds the trustee disposed to misapply it, he can immediately apply to this court for redress. The court are therefore of opinion and decree, that in this case the complainant is not obliged to attend to the disposition of the purchase-money of the estate, conceiving that the *cestuis que trust*, who are parties to the conveyance, are fully competent, and the only persons who ought to interest themselves in the business." Notwithstanding the narrow ground of this decision, the case is referred to in *Redheimer* ads. *Pyron*, 1 Spear's Equity, 135, 141, as establishing that, in general, purchasers from a trustee are not bound to see to the application of the purchase-money. "It might be a question, however," said the court in the latter case, "if the purchasers know that the trustee intends to misapply the money, and pay it to him with that knowledge, they might not, in the event of his insolvency, be compelled to make good any deficiency of the fund." And *Wormley v. Wormley*, 8 Wheaton, 422, 442, establishes the principle, that if a trustee in a marriage settlement under a power to sell and re-invest, sells under circumstances that constitute a breach of trust, namely not for the purpose of re-investment, but for the purpose of paying his own debts, and the purchaser has notice of this, the land in his

hands is affected with the trusts which previously attached to it.

In New York the Revised Statutes (vol. 1, p. 730, ss. 65, 66,) provide, that, "where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void," but that "no person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall be responsible for the proper application of such money, according to the trust; nor shall any right or title, derived by him from such trustee, in consideration of such payment, be impeached or called in question, in consequence of any misapplication, by the trustee, of the moneys paid." Since these provisions, it has been held, that if a purchaser under a power in a will to trustees to sell and invest the proceeds, for the purposes of the trust, has express notice, at the time of sale, that the sale was not made for the purpose of investing the proceeds in conformity with the trust created in the will, but for a different purpose, he is not protected; *Champlin v. Haight*, 10 Paige, 275; reversed on another point, on appeal, 7 Hill, 245.

[All the cases seem to agree, that when the disposition of the proceeds depends, in any material particular, upon the discretion of the trustee, or when an interval must or may properly elapse between the sale and the application of the purchase-money, the purchaser will be freed from liability by a payment to the trustee, and will not be responsible for a subsequent misappropriation by the latter; *Wormley v. Wormley*, 8 Wheaton, 422;

Sims v. Lively, 14 B. Monroe, 433, 449; *Coonrod v. Coonrod*, 6 Hammond, 114; *Hauser v. Shore*, 5 Iredell, Eq. 357. Trusts for sale and re-investment, are emphatically within the operation of this principle, because every investment requires the exercise of discretion in the selection and choice of proper security, and must necessarily be delayed until a suitable opportunity is found for investing; and the rule has consequently been said to be, that whenever a trustee is required or authorized to sell and re-invest for the same trusts or purposes, the purchaser will be discharged from all responsibility for the application of the money paid by him to the trustee; *Dalzell v. Crawford*, 1 Parson's Eq. 37, 50; *Lanning v. Peyton*, 12 Desaussure, 375; *Redheimer v. Peyron*, 1 Spear, Eq. 141; *Sims v. Lively*.

In general, those who deal with an executor or trustee, within the scope and limits of the trust, are entitled to presume that he is acting in good faith,

and in the due discharge of the duties of his office; and hence the title of a purchaser from a trustee who is authorized to sell for the payment of debts, will, in general, be equally good, whether there are, in point of fact, any debts or not; *Garnett v. Macon*, 6 Call; 2 Brockenborough, 185, *Williamson v. Morton*, 2 Maryland, Ch. 94, 103; and it would even seem doubtful, whether such a sale will be invalidated by notice that the debts have been paid, or that none ever existed: because these are questions of which the trustee is the judge and not the purchaser; Hill on Trustees, 506, note; *Williamson v. Morton*. But the purchaser will unquestionably be liable to the *cestui que trust*, if he knows that the trustee is acting in violation of his trust, or even, as it would seem, that he intends to violate it, and is resorting to a sale as a means of accomplishing his purpose; *Garnett v. Mucon*; *Williamson v. Morton*; *Clyde v. Simpson*, 4 Ohio, N. S. 445.]

CONTRIBUTION, SUBROGATION.

*DERING v. EARL OF WINCHELSEA.

[*78]

IN THE EXCHEQUER. FEB. 8, 1787.

REPORTED 1 COX, 318. S. C., 2. B. & P. 270.

CONTRIBUTION BETWEEN CO-SURETIES.]—*The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burthen and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute.*

THOMAS DERING, Esq., having been appointed collector of some of the duties belonging to the customs, it became necessary, upon such appointment, for him to enter into bonds to the Crown with three securities for the due performance of this office. Sir Edward Dering his brother, the Earl of Win-

chelsea, and Sir John Rous having agreed to become sureties for him, a joint and several bond was executed by Thomas Dering and Sir Edward Dering to the Crown in the penalty of £4000; another joint and several bond by Thomas Dering and the Earl of Winchelsea, and a third by Thomas Dering and Sir John Rous, in the same penalty of £4000; all conditioned alike for the due performance of Thomas Dering's duty as collector. Mr. Dering being in arrear to the Crown to the amount of 3883*l.* 14*s.*, the Crown put the first bond in suit against Sir Edward Dering, and judgment was obtained thereon for that sum; whereupon Sir Edward filed this bill against the Earl of Winchelsea and Sir John Rous, claiming from them a contribution towards the sum so recovered against him.

The cause has been argued at length in *Michaelmas* Term last, and now stood for judgment.

[*79] *LORD CHIEF BARON EYRE.—This bill is brought by one surety against his two co-sureties, under the circumstances (above mentioned). Mr. Dering's appointment, the three bonds, and the judgment against the plaintiff are in proof in the cause; the original balance due, and the present state of it, are admitted.

The demand is resisted on two grounds: first, that there is no foundation for the demand in the nature of the contract; and, secondly, that the conduct of Sir Edward Dering has been such as to disable him from claiming the benefit of the contract, though it did otherwise exist. There is also a formal objection, which I shall take notice of hereafter.

I shall consider the second ground of objection first, in order to lay it out of the case. The misconduct imputed to Sir Edward is, that he encouraged his brother in gaming and other irregularities; that he knew his brother had no fortune of his own, and must necessarily be making use of the public money; and that Sir Edward was privy to his brother's breaking the orders of the Lords of the Treasury, to keep the money in a particular box, and in a particular manner, &c. This may all be true, and such a representation of Sir Edward's conduct certainly places him in a bad point of view; and perhaps it is not a very decorous proceeding in Sir Edward to come into this court under these circumstances. He might possibly have involved his brother in some measure, but yet it is not made out to the satisfaction of the Court that these facts will constitute a defence. It is argued that the author of the loss shall not have the benefit of a contribution; but no cases have been cited to this point, nor any principle which applies to this case. It is not laying down any principle to say, that his ill conduct disables him from having any relief in this court. If this can be founded on any principle, it must be that a man must come into a Court of equity with clean hands: but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal, as well *as in a moral sense. In a moral sense, the companion, and perhaps, the conductor of Mr. Dering, may be said to be the author of the loss, but, to legal purposes, Mr. Dering himself is the author of

it; and if the evil example of Sir Edward led him on, this is not what the Court can take cognizance of. Cases, indeed, might be put, in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship, if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech, as applied to Sir Edward Dering in this case.

The real point is, whether a contribution can be demanded between the obligors of distinct and separate obligations under the circumstances of this case. It is admitted, that, if there had been only one bond in which the three sureties had joined for 12,000*l.*, there must have been a contribution amongst them to the extent of any loss sustained: but it is said, that that case proceeds on the contract and privity subsisting amongst the sureties, which this case excludes; that this case admits of the supposition that the three sureties are perfect strangers to each other, and each of them might be ignorant of the other sureties, and that it would be strange to imply any contract as amongst the sureties in this situation; that these are perfectly distinct undertakings without connexion without each other; and it is added, that the contribution can never be eodem modo as in the three joining in one bond for 12,000*l.*; for there, if one of them become insolvent, the two others would be liable to contribute in moieties to the amount of 6000*l.* each, whereas here it is impossible to make them contribute beyond the penalty of the bond. Mr. Madocks has stated what is decisive, if true, that nobody is liable to contribute who does not appear on the face of the bond. If this means only that there is no contract, then it comes back to the question whether the right of contribution is founded on contract.

If we take a view of the cases, both in law and equity, *we shall find that *contribution is bottomed and fixed on general principles* [*81] *of justice, and does not spring from contract: though contract may qualify it*, as in *Swain v. Wall*, 1 Ch. Rep. 149. In the Register, 1766, there are two writs of contribution—one inter co-hæredes, the other inter co-feoffatos; these are founded on the Statute of Marlbridge. The great object of the statute is, to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in Fitzh. N. B. 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page, Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and as between co-feoffees, he supposes there shall be no contribution without an agreement, and the words of the writ countenance such an idea, for the words are “*ex eorum assensu* ;” and yet this seems to contravene the express provision of the statute. As to co-heirs, the statute is express; it does not say so as to feoffees, but it gives contribution in the same manner. In *Sir William Harbert's case*, 3 Co. 11 b, many cases of contribution are put; and the reason given in the books is, that in *æquali jure* the law requires equality: one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. *Contract* is

never mentioned. Now, the doctrine of equality operates more effectually in this court than in a court of law. The difficulty in *Colce's cases* was how to make them contribute; they were put to their *auditâ querelâ*, or *scire facias*. In equity there is a string of cases, in 1 Eq. Ca. Ab., tit. "Contribution and Average." Another case occurs in Hargr. Law Tracts,¹ on the right of the King on the prisage of wine. The king is entitled to one ton before the mast, and one ton behind; and in that case a right of contribution accrues, for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely. But the contribution is given of course on general principles, which govern all these cases.

[*82] Now, to come to the particular case of sureties. It is *clear that one surety may compel a contribution from another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement? In all these cases the sureties have a common interest and a common burthen; they are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument, with this difference only, that the penalties will ascertain the proportion in which they are to contribute; whereas, if they had joined in one bond, it must have depended on other circumstances.

In this case, the three sureties are all bound that Mr. Dering shall account for the moneys he receives. This is a common burthen. All the bonds are forfeited at law and in this court, as far as the balance due. The balance might have been so great as to have exhausted all the penalties, and then the obligee forces them all to pay; but here the balance is something less than one of the penalties. Now, who ought to pay this? The one who is sued must pay it to the Crown, as in the case of prisage; but, as between themselves, there shall be a contribution, for they are in *æquali jure*. This principle is carried a great way where they are joined in one obligation; for if one should pay the whole 12,000*l.*, and the second were insolvent, the third shall contribute a moiety, though he certainly never meant to be liable for more than a third. This circumstance, and the possibility of one being liable for the whole, if the other two should prove insolvent, suggested the mode of entering into separate bonds; but this does not vary the reason for contribution, for there is the *same* principle and the *same* engagement; all are equally liable to the obligee to the extent of the penalty of the bonds when they are not all exhausted. If, in the common case of a joint bond, no distinction is to be made, [*83] why shall not the same rule govern here? As in *the case of average of cargo in a court of law, *qui sentit commodum sentire debet et onus*. This principle has a direct application here; for the charging one surety discharges the other, and each therefore ought to contribute to the onus. In questions of average, there is no contract or privity in ordinary cases; but it

is the result of general justice, from the equality of burthen and benefit. Then there is no difficulty or absurdity in making a contribution take place in this case, if not founded on contract, nor any difficulty in adjusting the proportions in which they are to contribute, for the penalties will necessarily determine this.

The objection in point of form, which I before mentioned, is, that the bill cannot be sustained, inasmuch as it has not charged the insolvency of the principal debtor, and that such a charge is absolutely necessary. As a question of form, it ought to have been brought on by demurrer; but, in substance, the insolvency of Mr. Dering may be collected from the whole proceedings, which strongly imply it; for the plaintiff appears to have submitted to the judgment, and the defendants have made their defence on other grounds.

On the whole, therefore, we think that the plaintiff is entitled to the relief he prays, and declare that the balance due from Thomas Dering being admitted on all hands to amount to the sum of 3883*l.* 14*s.* 8½*d.*, the plaintiff, Sir Edward Dering, and the two defendants, the Earl of Winchelsea and Sir John Rous, ought to contribute in equal shares to the payment of that sum, and direct that the plaintiff and defendants do pay in discharge thereof, each of them, the sum of 1294*l.* 11*s.* 7*d.*; and that on payment thereof, the Attorney-General shall acknowledge satisfaction on the record of the said judgment, and that the two bonds entered into by the Earl of Winchelsea and Sir John Rous be delivered up to them respectively. But this not being a very favourable case to the plaintiff, and the equity he asks being doubtful, we do not think it a case for costs.

*“The principle,” observes Lord Redesdale, “established in the case of *Dering v. Lord Winchelsea*, is universal, that the right and duty of [*84] contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering v. Lord Winchelsea*; and in that case there was no evidence of contract:” *Stirling v. Forrester*, 3 Bligh, 59. See also *Craythorne v. Swinburne*, 14 Ves. 160, 165, 169; *Hartly v. O’Flaherty*, 1 Beat. 77, 78; *Ware v. Horwood*, 14 Ves. 31; *Mayhew v. Crickett*, and note, 2 Swanst. 189, 192; *Spottiswoode’s case*, 6 De G. Mac. & G. 345, 371, 375; where the doctrine laid down in *Dering v. Lord Winchelsea* has been recognised and approved of.

Courts of common law, in modern times, have assumed a jurisdiction to compel contribution between sureties, in the absence of positive contract, on

the ground of implied assumpsit: inasmuch as the principle of contribution being in its operation established, a contract may be inferred, upon the implied knowledge of that principle by all persons. This jurisdiction is convenient enough, in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous; especially since it has been held, that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads: *Craythorne v. Swinburne*, 14 Ves. 164; *Cowell v. Edwards*, 2 B. & P. 268; see also 1 Saund. R. 264, n. (a), Williams's note, (b).

In other respects, as will be hereafter seen, the jurisdiction at common law is much more confined and less beneficial than in equity. Thus, where there are several sureties, and one becomes insolvent, the surety who pays the entire debt can in equity compel the solvent sureties to contribute towards payment of the entire debt, (*Peter v. Rich*, 1 Ch. Rep. 34; *Hole v. Harrison*, 1 Ch. Ca. 246; S. C., Finch, Rep. 15, 203; *Hitchman v. Stewart*, 3 Drew. 271; and see *The Mayor of Berwick v. Murray*, 26 L. J., N. S. (Ch.) 201;) but at law he can recover no more than an aliquot part of the whole, regard being [*85] had *to the number of co-securities: *Cowell v. Edwards*, 2 B. & P. 268; *Browne v. Lee*, 6 B. & C. 697; S. C., 9 D. & R. 700. See, also, *Rogers v. Mackenzie*, 4 Ves. 752; *Wright v. Hunter*, 5 Ves. 792; *Batard v. Hawes*, 2 E. & B. 287. So, also, if one of the sureties dies, in equity contribution can be enforced as against his representatives; but at law an action lies only against the surviving sureties: *Primrose v. Bromley*, 1 Atk. 90; *Batard v. Hawes*, 2 E. & B. 287.

It may here be observed that, in all cases of contribution, the jurisdiction assumed by courts of law does not affect the original jurisdiction of courts of equity: *Wright v. Hunter*, 5 Ves. 794, where Lord Alvanley, M. R., says, "I would not lay down, nor have it understood, that, because courts of law may entertain actions upon such subjects, a party may not file a bill for contribution."

It is clear, as laid down by the Lord Chief Baron, in *Dering v. The Earl of Winchelsea*, that a surety may compel contribution from another for payment of a debt for which they are jointly or severally, or jointly and severally, bound by the same instrument: *Fleetwood v. Charnock*, Nels. 10; *Underhill v. Horwood*, 10 Ves. 226; *Craythorne v. Swinburne*, 14 Ves. 164. It was, however, decided for the first time in *Dering v. The Earl of Winchelsea* that there is no difference whether the parties are bound in the same or by different instruments, provided they are co-securities for the same principal and in the same engagement; and further, that there is no difference if they are bound in different sums, except that contribution could not be required beyond the sum for which they had become bound. In *Craythorne v. Swinburne*, 14 Ves. 169, Lord Eldon said that he argued *Dering v. The Earl of Winchelsea*, and that he was much dissatisfied with the whole proceeding and with the judgment; but he had been since convinced that the decision was upon right principles. "Lord Chief Baron Eyre," observed his Lordship, "in that case decided that this obligation of co-securities is not founded in contract, but

stands upon a principle of equity." See also *Ware v. Horwood*, 14 Ves. 31; *Mayhew v. Crickett*, 2 Swanst. 192; *Stirling v. Forrester*, 3 Bligh. 596.

And it seems that the right of a surety to enforce contribution against co-sureties will not be affected by his ignorance at the time he became surety that they were also co-sureties: *Craythorne v. Swinburne*, 14 Ves. 163, 165.

Where, however, sureties are bound by different instruments for distinct portions of a debt due from the same principal, if the suretyship of each is a separate and distinct transaction, the doctrine laid down in *Dering v. Lord Winchelsea* will not apply, and *there will be no right of contribution [*86] among the sureties: *Coope v. Twyman*, 1 T. & R. 426.

A surety will in equity be entitled to interest from his co-sureties for the money which he has paid: *Lawson v. Wright*, 1 Cox, 275, 277; *Hitchman v. Stewart*, 3 Drew. 271; *Swain v. Wall*, 1 Ch. Rep. 149; *Petre v. Duncombe*, 15 Jur. 86. See, however, *Ongé v. Truelock*, 2 Moll. 31, 42; *Bell v. Free*, 1 Swanst. 90; *Rigby v. M'Namara*, 2 Cox, 415.

Although the principle of contribution is not founded upon contract, still a person may by contract qualify or take himself out of the reach of the principle or the implied contract. Thus, where three persons became bound for the principal debtor in an obligation, and agreed among themselves that, if the principal debtor failed to pay the debt, they would pay their respective parts; two became insolvent, and the third paid the money, and one of the insolvent sureties afterwards becoming solvent, he was held liable to contribute one-third only: *Swain v. Wall*, 1 Ch. Rep. 149; see also *Craythorne v. Swinburne*, 14 Ves. 165; *Coope v. Twynam*, 1 T. & R. 426; *Collins v. Prosser*, 1 B. & C. 682. So, also, a person may take himself entirely out of the principle, as where he becomes merely a collateral surety, by limiting his liability to payment of the debt upon the default of the principal and other sureties; and on a bill in such a case, filed for contribution, parol evidence is admissible to show what the real contract was, and to rebut the implied contract which equity raises in cases of contribution: *Craythorne v. Swinburne*, 14 Ves. 160, overruling *Cooke v. —*, 2 Freem. 97; S. C., 2 Eq. Ca. Ab. 223, pl. 1; see also *Hartly v. O'Flaherty*, L. & G., temp. Plunk. 217, where Lord Plunket says, "In the case of A. undertaking that if the principal does not pay, and if B., who has already become security, does not pay, he, A., will pay, it seems perfectly clear that B., in that case paying the whole, would have no claim of contribution against A."

Sureties who have paid the debt are not only entitled to contribution from the other sureties, but also to the benefit of any security which any of them may have taken from the principal debtor by way of indemnity: *Swain v. Wall*, 1 Ch. Rep. 149; and it is a general rule (subject, however, to some few qualifications) that a surety is entitled to the benefit of all the securities which the creditor has against the principal. Thus, if a surety join with the principal in a promissory note or bond, and the surety pays the debt, he will be entitled to have a transfer of any mortgage which the creditor may have taken for his debt. "I take it," says Lord Eldon, "to be exceedingly clear, if at the time a bond is given a mortgage is also made for securing the debt,

[*87] the *surety, if he pays the bond, has a right to stand in the place of the mortgagee; and, as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid:” *Copis v. Middleton*, T. & R. 231; see also *Hodgson v. Shaw*, 3 My. & K. 195; *Gayner v. Royner*, cited in *Robinson v. Wilson*, 2 Madd. 434; *Yonge v. Reynell*, 9 Hare, 809; [*Regina v. Salter*, 1 Hurlstone & Norman, 274;] and it is immaterial that the surety is not aware of the existence of the mortgage: *Mayhew v. Crickett*, 2 Swanst. 191; *Scott v. Knox*, 2 Jones, 778.

But where the creditor advances a further sum upon the security of the mortgage, the surety cannot compel the creditor to assign it to him, unless he pays off the further sum, as well as the sum for the payment of which he became surety: *Williams v. Owen*, 13 Sim. 597.

The right of the surety to have the benefit of the securities held by the creditor is derived from the obligation on the part of the principal to indemnify the surety: *Yonge v. Reynell*, 9 Hare, 818.

Courts of equity, it seems, would, at a very early period, compel assignments of securities to a surety to a much greater extent than in later times they took upon themselves to do. There is a very strong instance of the application of that equity in *Parsons v. Briddock*, 2 Vern. 608. In that case the principal had given bail in an action; judgment was recovered against the bail; afterwards the surety was called upon and paid; and it was held that he was entitled to an assignment of the judgment against the bail. So that, though the bail were themselves but sureties as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. See, however, *Hodgson v. Shaw*, 3 My. & K. 189, and *Armitage v. Baldwin*, 5 Beav. 278, where a creditor sued his principal debtor and recovered a judgment against him and the bail in the action. The surety thereupon “paid and satisfied” to the creditor the amount of the judgments, with interest and costs, and took an assignment thereof. Lord Langdale, M. R., held, that the judgment was discharged, and that the surety could not recover on the judgment against the bail. See also *Dowbiggin v. Bourne*, 2 Y. & C. Exch. Ca. 462.

[*88] Upon the same principle, *although it was at one time thought that a surety, paying off the debt of the principal, secured by their bond, was entitled to have from the creditor an assignment of the debt and of the bond by which it was evidenced or secured, the contrary, however, was fully established in two cases decided by Lord Eldon and Lord Brougham, where the whole subject was examined in a most elaborate manner. In *Copis v. Middleton*, 1 T. & R. 229, Lord Eldon said:—“It is a general rule, that, in equity, a surety is entitled to the benefit of all the securities which the creditor has

against the principal; but then the nature of those securities must be considered. Where there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. In the case, for instance, where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond; but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.' So, also, Lord Brougham, in *Hodgson v. Shaw*, 3 My. & K. 190, observes:—"The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the Court in this respect was luminously expounded in the argument of Sir Samuel Romilly in *Craythorne v. Swinburne*; and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.' I have purposely taken this statement of *the right, because it is there [*89] placed as high as it ever can be placed, and yet it is quite consistent with the principle of *Copis v. Middleton*. Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment? The surety may enforce any security against the debtor which the creditor has; but, by the supposition, there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him; but there are, in the case supposed, none to transfer—they are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage."

[Whatever the rule may be in equity, there can, it has been said, be no payment at law after breach, without an intention to satisfy or extinguish on one side, and an express or implied agreement to receive in satisfaction on the other; *Thomas v. Cross*, 7 Exch. 728; *Breck v. Blanchard*, 2 Foster, 303; *The Kingston Bank v. Gay*, 19 Barb. 459; payment at the day being performance, but payment after the day merely another name for satisfaction;

Kington v. Kington, 11 M. & W. 233; and hence, a payment by one of several joint debtors has been held not to be a defence to a subsequent suit for his use or benefit against the others, if the circumstances are such as to show, that the object in view was a purchase of the debt, and not an extinguishment. Thus, in *M'Intyre v. Miller*, 13 M. & W. 725, proof that one of several joint debtors had paid the debt, and had it assigned to a third person in trust for his benefit, was held not to preclude a recovery for the use of the trustee, although the assignment was of necessity purely equitable, and therefore inoperative at law, except as evidence of intention. It is, however, probable that the courts of this country would refuse to recognize the validity of this distinction in any case where the party who makes the payment is primarily liable for the debt, and, therefore, not entitled to keep it in force against others after it has ceased to be binding on himself. Payment and the possession and production of a bond by the obligee, were said in *Carroll v. Bower*, 7 Gill, 34, to raise an insurmountable presumption of extinguishment, which could not be rebutted by proof that the intention was to purchase or keep alive; and equity will, in this as in other cases, follow the law, unless some sufficient reason is shown for departing from it. To hold that the principal can acquire the control of the debt for the purpose, or with the effect, of making the surety answerable for that which the latter can recover back in an action of assumpsit, would be as much at variance with policy and justice on the one hand, as viewing a payment by the surety, in the light of an extinguishment, and not of a purchase, can be on the other; and sound reason would seem to require that the acts and dealings of the parties to a contract should be governed by the rule which prevails where an entry is made on land, and interpreted by their rights and duties and not merely by their intentions; *Kinley v. Hill*, 4 W. & S. 426; *Bartlett v. Lang*, 4 Ala. 688; *Logan v. Reynolds*, 21 Id. 56. The law was so held in *Logan v. Reynolds*, where a judgment against a firm had been paid by a third person, with money furnished by one of the partners, and an assignment taken of the judgment with a view of enforcing it against the other partners; and Dargan, C. J., who delivered the opinion of the court, said, that where a judgment is paid by one who is a principal in the debt, and as such, bound to pay, he cannot, by obtaining an assignment of the judgment, keep it alive in order to coerce payment from his co-principals, and will not be permitted to do that in the name of another, which he would not be entitled to do in his own. So, in *Jones v. Davids*, 4 Russell, 277, an assignment of the bond to the surety at the time of payment, was held not to rebut the presumption that it was absolutely paid; and although this case would not be followed in most of the States of this country on the point actually before the court, it is not the less an authority for the principle, that extinguishment is a question of right and not merely of intention.

A similar view was taken in *Eastman v. Plumer*, 1 Fogg, 238, and proof that a payment had been made by the principal, with the funds and for the account of a third person, held insufficient to turn the payment into a purchase, there being no evidence that the agency had been disclosed at the time when the money was paid. The soundness of this decision is obvious, because a sale

cannot be binding, either at law or in equity, without the assent of the vendor, or unless the circumstances are such as to make it his duty to assent, which can hardly be said when money is proffered by one who is bound to pay absolutely in ease of others, whose liability is secondary when compared with his own. More doubt may be felt as to the case of *Hopkins v. Scott*, 1 Fogg, 425, which decides that payment by a surety will not enure as a purchase, unless the creditor is apprised that the intention is to buy, and not to extinguish. The question, in this case, grew out of the negotiation of a note after it had been paid by one of the makers, who had signed it for the accommodation of the other, and the decision may perhaps be explained on the ground that a payment cannot operate as a purchase at law, unless both parties concur in the intention to buy and sell, and that the right of subrogation will not be carried farther by equity, than is necessary for the protection of the surety, and consequently will not warrant the negotiation of a note after it has been paid.

The difference between the view taken by law and equity on this important point seems to be, that at law, time is material, and payment after the day can only be good as an accord and satisfaction, which requires the minds of the parties to unite in an agreement to give and receive in satisfaction; *Kington v. Kington*, 11 M. & W. 233; *Thomas v. Craft*, 7 Exchequer, 728; while equity regarding time as immaterial, when money is in question, looks on the payment of principal and interest as performance, whether made at the day or at a subsequent period, and consequently regards the obligation of the debt as at an end, as soon as it has been fulfilled by any one who is answerable for its fulfilment, without regard to his intention or to that of the creditor. This view has been adopted by many of the common law tribunals of this country, which generally refuse to allow the effect of payment as a discharge of the debt, to be negatived by proof that the debtor did not mean to make, or the creditor to receive, satisfaction, unless justice requires that the debt should be kept alive as between or against particular parties, when one equity will be rebutted by another, and the payment converted into an equitable purchase; by subrogating the person who made it to the rights and remedies of the creditor.]

It was decided in *Copis v. Middleton*, contrary to what was formerly considered to be the law, that a surety, paying off the bond debt of the principal, was in the administration of his assets merely a simple contract, and not a specialty creditor. See also *Jones v. Davids*, 4 Russ. 277.

According to the law of Scotland the surety has always been entitled to call upon the creditor for a surrender or assignment of all separate and collateral securities obtained by him for the debt, his right not being limited by the exception introduced or approved of by *Copis v. Middleton* and *Hodgson v. Shaw*. "The equity and propriety of the Scottish rule," are by the Mercantile Law Commissioners stated to be "obvious, inasmuch as the surety obtains much aid in operating his relief from the hardship of having been compelled to pay another party's debt, and yet no detriment is thereby inflicted on any other party." (Mercantile Commission, Second Report, 1855, p. 13.) And, in accordance with their recommendation, the law of England upon this sub-

ject has been assimilated to that of Scotland by the Mercantile Law Amendment Act, 1856, (19 & 20 Vict. c. 97,) which enacts, that "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such persons shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding [*90] at law or equity, in order to obtain from the principal *debtor, or any co-security, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable." Sect. 5. See *Allen v. De Lisle*, 5 W. R. 158, V. C. S.

Where, however, a surety upon a second bond, given by him as a collateral security for a debt secured by the original bond of his principal, paid off the debt, he would, even under the old law, have been entitled to an assignment from the creditor of the original bond; for the original bond still remained as an existing security, and the surety, therefore, upon an assignment of it, ranked as a specialty creditor against the assets of the principal debtor. Thus, in *Hodgson v. Shaw*, 3 My. & K. 183, "A. and B. executed a joint and several bond, to secure a sum of money with interest to W. Subsequently to the deaths of A. and W., the executors of W. obtained from B. as principal, and from C. as surety, another bond, to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond; but after C.'s death the second bond was paid off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them: it was held, in a suit to administer the estate of A., that C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond."

In many other cases, the surety paying the debt will have a right to stand in the place of the creditor. Thus, where the creditor has proved the debt against the estate of the principal, and the surety afterwards pays him the debt, the creditor will be held a trustee of the dividends for the surety: *Ex parte Rushworth*, 10 Ves. 409; *Wright v. Morley*, 11 Ves. 12; *Watkins v. Flanagan*, 3 Russ. 421. So also it is now the settled law that a surety may compel the principal creditor to go in and prove the debt under the fiat or

commission, and if the surety pays the whole, the creditor will be a trustee of the dividends for him: *Ex parte Rushworth*, 10 Ves. 414.

A surety for a part of a debt is not entitled to the benefit of a security *given by the debtor to the creditor at a different time, in a distinct transaction for another part of the debt: *Wade v. Coope*, 2 Sim. 155. [*91]

Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the common obligation: *Reed v. Norris*, 2 My. & Cr. 361, 375.

It has been uniformly declared, and fully acted upon, in the Courts of Chancery in this country, that the claim for contribution among co-sureties, as well as the claim for indemnity on the part of the surety against the principal, is founded, not upon contract, but upon a principal of natural equity and justice; the maxim adopted in regard to co-sureties being, that equality is equity among persons standing in the same situation: *M'Mahon, &c. v. Fawcett, &c.*, 2 Randolph, 514, 529; *Moore v. Moore*, 4 Hawks, 358, 360; *Moore v. Isley*, 2 Devereux & Battle's Equity, 372, 373; *Allen v. Wood*, 3 Iredell's Equity, 386; *Screven v. Joyner, Ex'r, and others*, 1 Hill's Chancery, 252, 260, 261; *M'Kenna v. George*, 2 Richardson's Equity, 15, 17; *Breckinridge v. Taylor*, 5 Dana, 110, 112; *Mills v. Hyde*, 19 Vermont, 60, 64; *Strong et al. v. Mitchell et al.*, Id. 644, 647; *Craig & Angle v. Ankeney*, 4 Gill, 225, 231: "and the solidity and necessity of this doctrine," said Chancellor Kent, in *Campbell v. Mesier*, 4 Johnson's Chancery, 334, 338, "were forcibly and learnedly illustrated by Lord Ch. Baron Eyre in the case of *Dering v. Earl of Winchelsea*:" and the same principle now prevails at law: *Harris v. Ferguson*, 2

Bailey, 397, 400; *Norton v. Coons*, 3 Denio, 130, 132. This equity springs up at the time the relation is entered into, and is consummated when the surety has paid the debt: *Wayland v. Tucker et als.*, 4 Grattan, 268. The practice of subrogation, or substitution, or the cession of remedies, is borrowed from the civil law; and, under the guidance of Chancellor Kent, has probably gone further in this country than in England. It is the creature of equity, and is administered so as to secure real, essential justice, without regard to form: *Enders, &c. v. Brune*, 4 Randolph, 438, 447; *Douglass v. Fagg*, 8 Leigh, 588, 598.

It may be convenient to consider, first, the claim of a surety for indemnity from his principal, and afterwards, the claim for contribution among co-sureties; and to speak of these, first, in equity, and then at law.

At law, a surety has no remedy until he has paid the debt; *Bonham v. Galloway*, 13 Illinois, 68; *Ponder v. Carter*, 12 Iredell, 32; but in equity, as soon as the debt has become payable, he may file a bill, under certain conditions, to compel payment of it by the principal, in order that he may be relieved from responsibility; *Ranelaugh v. Hayes*, 1 Vernon, 189;

Nisbet v. Smith, 2 Bro. C. C. 579, 582; *Pride v. Boyce*, Rice's Equity, 276, 287; *Bishop v. Day et al.*, 13 Vermont, 81, 88; *Hoffman v. Johnson*, 1 Bland, 103, 105; *Stevenson v. Taverners*, 9 Grattan, 398; *Rice v. Downing*, 12 B. Monroe, 44; *Wetzel v. Sponsler*, 6 Harris, 460; *Whitridge v. Durkee*, 2 Maryland, Ch. 442; 2 American Leading Cases, 363, 4th ed.; and it has been held that where judgment has been obtained against the principal and the surety, and the former is insolvent, the latter, before payment, may file a bill to compel the discharge of the debt out of the principal's estate in the hands of third persons; *Stump v. Rogers*, 1 Ohio, 533; *McConnell v. Scott and others*, 15 Id. 401: see also, *Green et al. v. Crockett et al.*, 2 Devereux and Battle's Equity, 390, 393. There are also special cases, in which the surety may compel the creditor to resort to the securities and liens which he holds, before coming upon the surety; *Hayes v. Ward*, 4 Johnson's Chancery, 123, 132; *Schroepffel v. Shaw*, 5 Barbour's S. Ct. 580, 589; *Vartie v. Underwood*, 18 Id. 561; *Kent v. Matthews et al.*, 12 Leigh, 574, 585; *Railroad Co. et al. v. Claghorn et al.*, 1 Spear's Equity, 547, 561; but this is where speedy, direct and certain redress can be had upon the security, and, then, only under peculiar circumstances; 2 American Lead. Cas., 369, 4th ed.; *Gary v. Cannon*, 3 Iredell's Equity, 64, 68: see post, vol. 2, note to *Aldrich v. Cooper*.

When the surety has paid the debt, equity has original jurisdiction to compel the principal to re-imburse him; *Moore, &c. v. Young*, 1 Dana, 516, 517; *Thomas v. Beckman*, 1 B. Monroe, 29, 30; *Partlow v. Lane*, 3 Id.

424, 425; *Baxter v. Moore*, 5 Leigh, 219, 221; *The Wesley Church v. Moore*, 10 Barr, 273.

Moreover, as soon as the surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor holds against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully as the creditor could have done: for the purpose of obtaining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditor; as substituted in the place of the creditor, and entitled to enforce all his liens, priorities, and means of payment, as against the principal, and to have the benefit even of securities that were given without his knowledge: see *Lidderdale v. Robinson*, 2 Brockenbrough, 160, 167; S. C., 12 Wheaton, 594, 596; *McMahon, &c. v. Fawcett, &c.*, 2 Randolph, 514, 530; *Hampton v. Levy*, 1 Mc'Cord's Chancery, 107, 117; *Perkins and others v. Kershaw and others*, 1 Hill's Chancery, 344, 351; *Railroad Co. et al. v. Claghorn et al.*, 1 Spear's Equity, 547, 561; *Loud v. Sergeant*, 1 Edwards, 164, 168; *Elwood v. Deifendorf*, 5 Barbour's S. Ct. 399, 413; *Lathrop & Dale's Appeal*, 1 Barr, 512, 517; *Atwood v. Vincent*, 17 Connecticut, 576, 583; *Hardcastle v. Commercial Bank of Delaware*, 1 Harrington, 374, 377, note; *Burk et al. v. Chrisman et al.*, 3 B. Monroe, 50; *Culhum v. Emanuel & Gaines et al.*, 1 Alabama, 23, 28; *Brown v. Lang et al.*, 4 Id. 50, 53; *Commercial Bank of Lake Erie v. Western Reserve Bank and others*, 11 Ohio, 444, 449; *Miller v. Woodward & Thornton, Adm'rs*, 8 Missouri, 169,

175; *Hill v. Manner*, 11 Grattan, 522; *Dechard v. Edwards*, 2 Sneed, 93; *Dodier v. Lewis*, 27 Mississippi, 679. "This right of the surety," says Chancellor Kent, in *Hays v. Ward*, 4 Johnson's Chancery, 123, 130, "stands not upon contract, but upon the same principle of natural justice, upon which one surety is entitled to contribution from another:" and the same thing is said in 1 Comstock, 599, 600. Payment by one who stands in the relation of a surety, although it may extinguish the remedy, or discharge the security, as respects the creditor, has not that effect as between the principal debtor and the surety. As between them, it is in the nature of a purchase by the surety from the debtor; it operates an assignment in equity of the debt and of all legal proceedings upon it, and gives a right in equity to call for an assignment of all securities; and, in favor of the surety, the debt and all its obligations and incidents, are considered as still subsisting. Those who make themselves answerable for a guaranty or debt subsequently, are as much entitled to the benefit of this rule as if their liability arose from, or was cotemporaneous with the original obligation; *Cottrell's Appeal*, 11 Harris, 294; *Haven v. Foley*, 19 Missouri, 622; the only question being whether the debt has been expressly or impliedly assigned by the creditor, or whether the circumstances are such as to make it his duty to assign it. These principles may be illustrated, in respect to (1) Bonds, (2) Judgments, (3) Liens upon land, (4) Mortgages and other real securities in which the title passes: and apply equally to securities in which the surety is jointly bound with the principal, and to those

which are cumulative and collateral to the original debt. The distinction adopted in *Copis v. Middleton*, that equity will not subrogate the surety, in those cases in which payment discharges or extinguishes the security at law, which reaches the case of bonds and judgments binding the surety jointly with the principal, and probably the case of bonds and judgments constituting or merging the debt, though the surety be not bound by them, and also the case of mere liens upon land, where the title does not pass, has, in general, not been adopted in this country: on the contrary, with the exception of the Courts of Alabama, Vermont, and North Carolina, it appears to be universally and firmly settled, that although the security or lien be extinguished at law, yet for the benefit of the surety by whose money or property the creditor has been satisfied, it continues equitably in full force.

1. *In regard to Bond debts.*—It is not a principle of equity, in this country, that a surety, discharging a bond debt, is in all cases considered as in the position merely of a simple contract creditor of his principal: wherever the distinction is of any benefit to the surety,—wherever a bond has any priority over a simple contract,—as, where the payment is after the principal's death, the surety, upon payment, will be regarded as holding the place of the bond creditor, and entitled to all the advantages which such a claimant has over simple contract creditors; *Smith v. Swain*, 7 Richardson's Eq. 112. This has been repeatedly decided in Virginia. At law, no doubt, a surety paying off a bond debt becomes only a simple contract creditor; *Dupuy et*

al. v. Southgates, 11 Leigh, 92, 97; see also *U. S. v. Preston & Bunker*, 4 Washington's C. C. 446, 452; *Carroll v. Bowie*, 7 Gill, 34; and where the bond is paid off by the surety, while the principal is alive and solvent, in which case the distinction is of no importance, as there is then no superior dignity in bond debts, the surety will be considered in equity, as what he is at law, only a simple contract creditor; per Tucker, P., in *Powell's Ex'ors v. White and others*, 11 Leigh, 309, 324: but after the principal's death, a bond creditor has, in Virginia, certain rights beyond a simple contract creditor, a right to charge the heir, and a right of priority in the administration of personal assets; and to these rights, a surety, upon payment of the debt, has an equity to be subrogated. The proper statement of the doctrine appears to be, that the surety is in equity, what he is at law, merely a simple contract creditor, but entitled to the security of the bond, as a means of reaching a class of assets upon which otherwise he would have no claim, viz., those appropriated to bond debts. Accordingly, when a surety pays off a bond debt, after the principal obligor's death, he has a right in equity to stand in the place of the obligee, and to insist on all his claims and advantages; *Eppes and others v. Randolph*, 2 Call, 125, 188; *Tinsley v. Anderson*, 3 Id. 329; *West v. Belches*, 5 Munford, 187, 194; *M. Mahon, &c. v. Fawcett, &c.*, 2 Randolph, 514, 533. And the ground of this principle is forcibly and satisfactorily illustrated by Tucker, P., in *Watts et al. v. Kinney et ux.*, 3 Leigh, 272, 294. "The whole train of authorities on this subject," he remarks, "is founded upon the principle of the

superior equity of the sureties, to be paid out of that fund to which their creditor might have resorted, for their relief. The surety in a bond, for the payment of which the principal has bound particular property, has a preference over all other persons, to have the debt charged upon that fund. If the principal dies, and after his death the surety pays off the bond, he has a right to demand the payment of the bond, out of the assets, before the simple contract creditors, and thus to be placed in the shoes of the obligee; because, at the instant of the principal's death, the obligee had a right to demand payment out of the assets, in preference to any simple contract creditor: in good faith, he should have demanded such payment, instead of putting the burden on the innocent surety: in good faith, the executor should have so applied the assets. An adequate portion should have been set apart and appropriated for that debt. No simple contract creditor had, or could have by law, any claim thereto. If the executor were sued by simple contract creditors, he might plead the outstanding bond in bar of the demand. He might fence around an adequate portion of assets against all their assaults. Nor is the state of things changed by payment being forced from the surety, or being voluntarily made by him. If forced from him, a court of equity will give him redress: it will consider him as standing in the shoes of the creditor, who ought to have looked to the estate of the principal, instead of drawing money from the pocket of the surety; it will consider the executor as holding a certain portion of the assets, as trustee for the payment of this very debt, and hold him to the

discharge of the trust in its spirit, when it can no longer be performed to the letter: and it will deny to the simple contract creditor, who has no right to these funds, the application of them to the payment of his debt. And why? If the surety discharge the bond, or a judgment and execution upon it, is he not a simple contract creditor only? and has not any other simple contract creditor a legal right to resort to this fund, as there is now no longer any bond or judgment to be charged upon it? and has he not equal equity? The answer is, No: he not only has not equal equity, but he has no equity whatever to charge a fund which in equity, and justice, belongs to another. He has no equity to demand that money, which by law ought to have been applied to pay my debt, shall be applied to pay his. The case is the same, if the payment is made voluntarily by the surety. In making that payment, he is governed by the law of this court. Even on entering into his engagement as surety, he looks to its well established principles. He knows, if he pays the debt to the obligee, he will stand in the obligee's shoes. He knows he will be subrogated to all the rights of the obligee, as they subsist at the time he makes his payment. He knows that a court of equity looks not to form but to substance; that it looks to the *debt* which is to be paid, not to the *hand* which may happen to hold it; that the fund charged with its payment, shall be so applied, whosoever may be the person entitled; and that it considers a debt as never discharged, until it is discharged by payment to the proper person, and by the proper person. He knows, that that court, which permits no act of a

trustee to prejudice a *cestui que trust*, will not permit one who stands in the relation of the creditor or obligee to the surety, to bar him of those rights which the principles of equity have secured to him. He is conscious that his rights do not depend upon the caprice of the creditor, or the whim of an executor, or the sense of right of other creditors, but rest upon the immutable principles of justice and equity; and, in making his payment, he does it in the confidence, that he will be entitled to be indemnified to the full amount, to which his creditor could have charged the assets of the principal." In the more recent case of *Powell's Ex'ors v. White and others*, 11 Leigh, 309, the decisions in *Copis v. Middleton*, and *Jones v. Davids*, were thoroughly examined in the Court of Appeals, and the Virginia practice was vindicated against the authority of Lord Eldon, with distinguished and convincing ability. See also *Wheatley's Heirs v. Calhoun*, 12 Id. 265, 274. The principle of these Virginia cases has been fully sustained by the Circuit and Supreme Courts of the United States; *Lidderdale v. Robinson*, 2 Brockenbrough, 160; S. C., 12 Wheaton, 594. In South Carolina, the same practice is established. In *Pride v. Boyce*, Rice's Equity, 276, the doctrine of *Copis v. Middleton* was discussed, not indeed where the surety had paid the debt, but where upon the bonds being due he had filed a bill to compel its payment by the principal's administrator; and it was decided that he was entitled to have it paid according to its priority as a bond debt. In *Schultz v. Carter et al.*, 1 Spear's Equity, 534, 543, the point was expressly determined. There, a surety in two joint and seve-

ral bonds, secured by mortgage, both of which were due and unpaid at the principal's death, had, after his decease, been compelled to pay one, and was sued upon the other : he insisted that he was entitled to reimbursement as a bond creditor out of the assets of the principal's estate, and also to have the benefit of the mortgage ; and the court held that he was entitled to both of these advantages. "The result of the cases," said Dunkin, Ch., "is, that a surety who pays a debt of a superior dignity, due by the estate of his deceased principal, is suffered to rank, in the application of assets, according to the dignity of the debt satisfied ; or, in other words, is substituted for the creditor who holds the prior debt, and is entitled to the benefit of any security which that creditor may have taken from the principal debtor." In New York and Pennsylvania, also, the right of subrogation to bonds, has been recognized ; see *Cheesebrough v. Mil-lard*, 1 Johnson's Chancery, 409, 413 ; *Croft v. Moore*, 9 Watts, 451 ; *Himes v. Keller*, 3 Watts and Sergeant, 401, 404 ; *Lathrop and Dale's Appeal*, 1 Barr, 512.

If a surety in a bond to the United States, pays the debt, he is entitled to the same preference over the other creditors, as the United States had ; Act of 1799, c. 128, s. 65 ; *United States v. Hunter*, 5 Mason, 62, 65 ; S. C. 5 Peters, 174 ; *Dias v. Bouchaud*, 3 Edwards, 485 ; and see *U. S. v. Preston and Bunker*, 4 Washington, 446. And this has been recognized as a general equity ; thus where one gave his bond to the United States, for the importer of goods, and afterwards paid it, he was held to be entitled to the same priority as the United States had, in his claim upon the es-

tate of the importer ; because, it was said, equity in the matter of subrogation, considers the substance of the relation, and not its mere form ; *Enders, &c. v. Brune*, 4 Randolph, 438, 447 : see also *Grider v. Payne*, 9 Dana, 188, 192. In one case, however, it was held that a surety in a bond to the United States, was not entitled to the creditor's priority, in his claim for contribution against his co-surety, but came in only as an ordinary creditor ; *Bank v. Adger*, 2 Hill's Chancery, 262, 266 : but as this was grounded on *Copis v. Middleton*, which has been since rejected in that state, the decision is probably no longer sound. And if the debt of the principal were a preferred debt, by statute, in the administration of his estate, the surety paying the debt will be entitled to the same preferences ; *Schoolfield's Adm'r v. Rudd, &c.*, 9 B. Monroe, 291.

2. *Judgments and Decrees.*—It is generally settled in this country, that a surety paying the debt, is entitled to be subrogated to a judgment or decree against the principal, and to have the benefit of its lien upon his land in preference to subsequent judgment creditors, and of its priority in the distribution of personal assets, and of being permitted to file a creditor's bill in his own name to obtain satisfaction out of assets which could not be reached by execution ; and this whether the judgment or decree is against the principal and surety jointly ; *Watts et al. v. Kinney et ux.*, 3 Leigh, 272, 293 ; *Speiglemyer v. Crawford*, 6 Paige, 254, 257 ; and see *Clason v. Morris*, 10 Johnson, 524 ; *Thompson v. Palmer*, 3 Richardson's Eq. 139 ; or whether the instrument upon which the surety's obligation arises, is collateral to the judgment

against the principal; *Rodgers v. M'Chuer's Adm'rs et als.*, 4 Grattan, 81; *Cottrell's Appeal*, 11 Harris, 294; *M'Clung v. Beirne*, 10 Leigh, 395, 400; in which latter case, Tucker, P., declared that it made no difference that the surety was not a party to the judgment.—The doctrine of *Copis v. Middleton*, will not in most of the states, be applied to deprive a surety of the benefit of a judgment against the principal; and though extinguished in law, such a judgment will be kept alive for the indemnity of a surety who has paid the debt. This is established in Virginia; *Tinsley v. Anderson*, 3 Call, 329; in New York, *Goodyear v. Watson*, 14 Barbour, 481; in Georgia, *M'Dougal v. Dougherty*, 14 Georgia, 674; and in South Carolina, *Burrows and Brown v. M'Whann and Campbell*, 1 Dessausure, 409; *Perkins and others v. Kershaw and others*, 1 Hill's Chancery, 344, 351; and though the former of these cases was a subrogation against a co-surety, the latter was against a principal debtor. In *Perkins and others v. Kershaw and others*, judgments had been obtained against the principal's administrators, and against the surety, for the debt, and executions issued: the surety paid, and the sheriff entered satisfaction on both executions: "In equity," said the Court, "the sureties, upon showing that they, and not the administrator, paid the money, would be allowed to vacate the entry of satisfaction on the execution by the sheriff as made by mistake, and to set up the judgment as a subsisting lien on the real estate of the deceased debtor." In Maryland and Delaware also, it is settled not only that a surety paying the debt, has a claim to be subrogated to the right of the creditor and to all

his liens and securities, but that a payment by the surety operates, in itself, as an assignment, in equity, of the debt and of a judgment upon it, so as to authorize him to sue, or issue execution in the creditor's name, for his use: and though as between the surety and creditor this equitable assignment cannot take place till the whole debt is paid, yet when it is fully paid, a partial payment by the surety will, as between him and the principal debtor, entitle him to an assignment *pro tanto*; *Norwood v. Norwood*, 2 Harris & Johnson, 238; *Sotheren v. Reed*, 4 Id. 307, 309; *Merryman v. The State*, 5 Id. 423, 427; *Hollingsworth v. Floyd*, 2 Harris & Gil. 88, 91; *Watkins v. Worthington*, 2 Bland, 509, 529; *Hardcastle v. Commercial Bank of Delaware*, 1 Harrington, 374, 377, 378, note. In Pennsylvania, the subrogation of a surety to a judgment against the principal is well established, and of every day occurrence; *Cottrell's Appeal*, 11 Harris, 294. The decisions in that state were reviewed by Kennedy, J., in *Lathrop and Dale's Appeal*, 1 Barr, 512, with especial reference to the doctrine in *Copis v. Middleton*. "From the cases it would appear," he concludes, "that we have adopted the general rule, that a surety by paying the debt of his principal becomes entitled to be subrogated to all the rights of the creditor, so as to have the benefit of all the securities which the creditor had for the payment of the debt, without any exception, as well those which became extinct, at law at least, by the act of the surety's paying the debt, as all collateral securities which the creditor held for the payment of it, which have not been considered as directly extinguished by the surety's paying

the debt. . . . These decisions have been made upon a supposed principle of equity, which, for the purpose of doing justice to the surety who has paid the debt, interposes to prevent the judgment, or security, which has been so extinguished at law, from being so considered as between the surety and the principal, or his subsequent lien creditors." When, moreover, the nature of the payment and the circumstances, are such as to entitle the creditor to subrogation, his right cannot be defeated by the creditor, nor satisfaction entered without his consent or approbation; *Baily v. Brownfield*, 8 Harris, 48.

3. *Liens upon the lands of the Principal.*—If a surety for the purchase-money, upon a sale of land, pays the debt, he is entitled to be subrogated to the vendor's lien for unpaid purchase-money, as against the vendee and purchasers from him with notice; *Kleiser, dec. v. Scott, &c.*, 6 Dana, 137; *Burk et al. v. Chrisman et al.*, 3 B. Monroe, 50; *Ghiselin and Worthington v. Fergusson*, 4 Harris & Johnson, 522; *Hagruder v. Peter*, 11 Gill & Johnson, 219, 228, 245; *Welch v. Parran et al.*, 2 Gill, 320, 329. In like manner, the surety of a vendor who is compelled to repay the purchase-money in consequence of the failure of the principal to execute a conveyance, will succeed to the right of the vendee to a specific performance, and have an equitable lien on the land, which he may enforce against purchasers, with notice of its existence; *Freman v. Mebane*, 2 Jones' Eq. 44; while a similar equity will arise when the purchase-money is paid by the surety for the purchaser; *Jordan v. Hudson*, 11 Texas, 82. In *Eddy v. Traver*, 6 Paige, 521, the heir of an

intestate had conveyed with warranty a part of the descended lands, and the administrator, afterwards, having obtained a surrogate's order for the sale of lands for the payment of debts, sold the land which had been thus conveyed; and the vendee was held entitled to the benefit of the lien of the debts upon lands remaining unsold in the possession of the heir. "It is an established principle of equity," said the Chancellor, "that sureties, or those who stand in the situation of sureties for those for whom they pay a debt, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien or equity which he may have against any other person or property on account of the debt. . . . In cases depending upon this equitable principle, as between the debtor and his sureties, it makes no difference, except as against *bona fide* purchasers or mortgagees, that the debt has been actually paid by the sureties, or out of their property, so that the creditor's lien upon the property of the principal debtor is extinguished at law." See also *Schermerhorn v. Barhydt*, 9 Paige, 30, 43; *Kinney's Ex'ors, &c. v. Harvey, &c.*, 2 Leigh, 70; *Haffey's Heirs v. Birchetts, &c.*, 11 Id. 83, 89; *In re M' Gill*, 6 Barr, 504.

4. *Mortgages, and other conveyances for the security of a debt.*—A surety paying a debt secured by mortgage is entitled to be substituted to the creditor's interest and lien under the mortgage, both where the surety is a joint-mortgagor with the principal, and where the mortgage is against the principal's property only, and the surety's obligation is collateral; *Loud v. Sergeant*, 1 Edwards, 164, 168; *Marsh v. Pike*, 1 Sandford, 211; S. C.

10 Paige, 595; *McLean v. Towle*, 3 Sandford, 117; *Loomer v. Wheelright*, Id. 136, 261; *Lowndes v. Chisolm*, 2 Mc'Cord's Chancery, 455; *Bank v. Campbell*, 2 Richardson's Equity, 180, 185; *Atwood v. Vincent*, 17 Connecticut, 576, 583; *Norton v. Soule*, 2 Greenleaf, 341; and the same principle applies where lands have been conveyed by a deed of trust for the payment of the debt; *Wheatley's Heirs v. Calhoun*, 12 Leigh, 265, 274; *Walker v. Crowder*, 2 Iredell's Eq. 479, 486; *Miller v. Ord*, 2 Binney, 382.

Alabama, North Carolina and Vermont appear to be the only states in which the doctrine of *Copis v. Middleton* has been adopted. In the first, it has been decided that the surety cannot avail himself of the instrument on which he is surety, after payment of it, because it is extinguished; *Houston v. The Bank*, 25 Alabama, 250; and this has been applied to instruments under seal; *Foster v. The Trustees of the Athenæum*, 3 Alabama, 302, 310; and to executions on a judgment against principal and sureties; *Morrison and Givhan et al. v. Marvin*, 6 Id. 797; *Saunders and McLaughlin v. Watson et al.*, 14 Id. 199. In North Carolina it was decided that a surety who had paid off a judgment against the principal and himself, became only a simple contract creditor of the principal, the judgment being, by payment, extinguished both at law and in equity; but it was said, that if at the time of payment he had taken an assignment of the judgment to a stranger, and had not intended satisfaction of it, it would have been kept alive as a judgment, for his benefit; *Briley v. Sugg*, 1 Devereux & Battle's Equity, 366. In Vermont,

there are dicta to the effect that a surety paying a judgment can be subrogated only to collateral securities and not to the judgment itself; *Pier-son v. Catlin*, 18 Vermont, 77, 85.

[It is well settled, that the remedy of a surety against the principal, lies in assumpsit upon an implied promise to indemnify, or for money paid, laid out, and expended, even when the obligation contracted with the creditor is under seal, and will consequently be barred by the Statute of Limitations, unless prosecuted within six years from the time at which the cause of action accrues; and it seems to have been held in *Fink v. Mahaffy*, 8 Watts, 384, that the right to subrogation rises no higher than the demand to which it is an incident, and consequently cannot be enforced by equity after the statute has attached, and has been pleaded successfully to a suit at law. But the cases are numerous, in which the payment of a bond has been held to entitle the surety to the rank of a debtor, by specialty, in the distribution of the assets of the principal, *ante*; and in *Smith v. Swan*, 7 Richardson's Eq. 112, the court were of opinion, that payment of a bond or other sealed instrument, places the surety virtually on the footing of a creditor by specialty, and beyond the reach of the Statute of Limitations. As this result would undoubtedly follow from a payment accompanied by an actual assignment, which would enable the surety to enforce the bond in equity, even after the bar of the statute had attached at law, it is difficult to see why it should not attend on or be produced by subrogation, which is virtually an assignment by operation or construction of equity. And whatever the true rule may be, when the

surety enters into the contract at the request of the principal, it would seem plain that the equity arising from a guaranty or other engagement for the payment of a debt, at the instance of the creditor, may be enforced as long as the debt survives as a binding obligation, because under these circumstances there is no legal right or cause of action on which the statute can operate, and the only remedy of the guarantor lies in treating the payment of the debt as a purchase, and exercising the powers which belong to the assignee of a *chose in action*. This view is in a great measure sustained by the case of *Elkinton v. Newman*, 8 Harris, 281; where payment of the arrears of a ground rent, under a guaranty given by an assignor of the rent at the time of the assignment, was held to entitle him to proceed against the tenant in the name of the assignee, for the amount thus paid, although more than six years had elapsed between the time of the payment, and that of action brought. We may, indeed, doubt whether a payment made under such circumstances, would operate as an extinguishment, or preclude the right of recovery, even at law, because payment under a covenant that another shall or will pay, not being a payment by him, is neither performance nor satisfaction, unless made so by the force of special circumstances. Payment at the day by the debtor, fulfils the contract, and puts an end to the obligation by its performance, and payment after the day, will operate as a satisfaction, if made and received with an intent to satisfy; but these results will not follow unless the payment is made by or on behalf of the debtor, and duly authorized by him; and consequently cannot

be produced by a payment by a third person, acting for himself, and in discharge of an obligation incurred solely at the request of the creditor: *ante*, 140; 2 Am. Lead. Cases, 270, 4th ed.

To give birth to the relation of principal and surety, as between themselves, and entitle one to proceed against the other for indemnity, the liability for the debt must have been assumed, at the request of the principal, or be a necessary result of the course of dealing between them. But it is not less true, that the creditor is entitled to seek and obtain the guaranty of a stranger, as additional security, without the consent of the surety, or to sell or transfer the debt to any one who is willing to pay the whole or part of what it is worth; and that the purchaser in the one case, and the guarantor in the other, will acquire all the rights of an assignee in equity, as soon as he has fulfilled his engagement by payment, and will consequently be entitled to subrogation to the debt, and to all the remedies of the creditor for its recovery from the principal, and those who have made themselves answerable for it as sureties; *Hughes v. Littlefield*, 18 Maine, 400; *Powers v. Nash*, 36 Id. 322; *Carter v. Jones*, 5 Iredell, Eq. 193; *Matthews v. Aiken*, 1 Comstock, 595; *Talmage v. Burlingame*, 9 Barr, 21; *Elkinton v. Newman*, 8 Harris, 281; *Peak v. Dorwin*, 25 Vermont, 28; 1 American Leading Cases, 408, 4th ed. Hence, whether the right of a guarantor or surety grows out of a contract with the creditor, with co-sureties, or with the principal, he will become a purchaser in equity on payment, and will consequently be entitled to all the remedies and securities incident to and necessary for the pro-

tection of the thing purchased. In like manner, when a surety takes the bond of a third person, as counter security, payment by the latter will entitle him to subrogation to the remedy of the surety against the principal; *Labeaume v. Sweeny*, 17 Missouri, 153.

Subrogation is limited to those cases where the relation in which the parties stand to each other, is such as to make it the duty of him against whom it is sought, to pay primarily in ease of the party who seeks it, or to render the latter a purchaser on payment; and hence it will not be enforced, as between those who are equally and jointly bound as co-partners, co-obligors, or co-contractors: *Bailey v. Brownfield*, 8 Harris, 41. But it is at the same time equally well settled, that a binding agreement by which one co-partner or co-contractor assumes the debt, or agrees to bear the whole burden of its payment in discharge of the rest, will give rise to the relation of principal and surety, and with it to the right of subrogation to the remedies of the creditor on the one hand, and to that of discharge on the other, if those remedies are wrongfully impaired or surrendered; *Oakley v. Pasheller*, 10 Bligh, New R. 548, 590; *Wood v. Dodgson*, 2 M. & S. 195; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Ætna Ins. Co. v. Wires*, 2 Williams, 87; *Morris v. Oakford*, 9 Barr, 498; *Fleming v. Bruce*, 2 Rawle, 128. It may moreover be remarked, in general, that the right of subrogation extends beyond the mere ordinary and familiar relation of principal and surety, to every instance in which the position of two parties is such, as to render one of them primarily liable for a debt, which is a charge on the per-

son or estate of the other, because under these circumstances, payment will give the latter a right to enforce all the remedies of the creditor against the former, or in other words, entitle him to subrogation; *Stevens v. Goodenough*, 26 Vermont, 676; see *post*, vol. 2, part 1st, note to *Aldrich v. Cooper*. Which of the parties to a sale is entitled to subrogation to a judgment, or other lien on the property sold, consequently depends on whether the sale was made subject to, or free from encumbrances; the vendor being entitled to resort to the judgment as an indemnity in the former case, and the vendee in the latter, *post*, vol. 2, note to *Aldrich v. Cooper*; *Johnson v. White*, 11 Barb. Accordingly a purchaser who buys land subject to a mortgage, which is deducted from the consideration, becomes himself primarily liable for the mortgage debt, and bound to indemnify the seller against it, thus assuming the position of a principal, and placing the vendor in that of a surety; *Marsh v. Pike*, 10 Paige, 595; *Cornell v. Prescott*, 2 Barbour, 17; *Thompson v. Thompson*, 4 Ohio, N. S. 333, 349; while the opposite result will follow, when the payment is in full, and the covenants in the deed makes it the duty of the vendor to discharge the incumbrances, and thus prevent them from falling on the land. In like manner a mortgage of the wife's land as security for the debt of the husband, will make it his duty to pay the debt in ease of the land, and consequently invest her with all the rights and privileges which belong to sureties, and among them, with that of subrogation; *Vartie v. Underwood*, 18 Barbour, 561; *Gahn v. Niemcewicz*, 3 Paige, 641; 11

Wend. 312; *Sudde v. Weishell*, 4 Harris, 134; *post*, vol. 2, *Earl and Countess of Huntingdon*, note.]

A surety, who compounds the debt, has no right at law to recover from the principal more than he has actually paid, or the value of property which he has given up; *Bonney v. Seely*, 2 Wendell, 481; and, in equity, his claim is to be subrogated to the rights of the creditor, only so far as to indemnify him; and, therefore, even if he should take a formal assignment of the security, he will be entitled to no more than he has paid to the creditor; *Lawrence v. Blow*, 2 Leigh, 30; see also *Hall's Adm'r v. Creswell et al.*, 72 Gill & Johnson, 37, 52. "A surety stands in such a relation to his principal," said Rogers, J., in *Wynn, Adm'r, v. Brooke et al.*, 5 Rawle, 106, 110, "that he cannot be permitted to speculate upon him." And the rule is the same in relation to contribution between co-sureties; *Hickman, &c. v. M'Curdy*, 7 J. J. Marshall, 555, 560.

The equity of a surety to be subrogated to the rights which the creditor has against the principal debtor or his estate, exists, as well, where the surety's property only is pledged, as where he came under a personal responsibility; *Niemcewicz v. Gahn*, 3 Paige, 614, 642, 648; 11 Wend. 312. And the creditors of a surety have the same right of subrogation which he has; *Neff v. Miller*, 9 Barr, 348, 350. The principle extends beyond the ordinary relation of principal and surety, and applies in every instance where one man has paid a debt for which another is primarily liable, and which should in point of equity and good conscience, have been discharged by

the latter; *Morris v. Oakford*, 9 Barr, 498. Thus while subrogation will not ordinarily be enforced as between joint or principal debtors; *Bailey v. Brownfield*, 8 Harris, 41; *Hogan v. Reynolds*, 21 Alabama, 56; it will be so whenever the circumstances are such as to make it the duty of one to pay the whole in ease of others; as when upon the dissolution or reconstruction of a firm, one or more of the partners promises to pay the partnership debts, in consideration of receiving or retaining the assets, which will place the rest in the position of sureties; *Aflalo v. Fourdrenier*, 6 Bing. 306; *Wood v. Dodgson*, 2 M. & S. 195; and entitle them to subrogation, if subsequently called upon for payment by the creditors; *The Aetna Ins. Co. v. Wires*, 2 Williams, 93; *Morris v. Oakford*.

It is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay, in order to protect his own interests, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor's rights, without an agreement to that effect; *Swan v. Patterson*, 7 Maryland, 164; *The Bank of the United States v. Marston*, 2 Brockenbrough, 254; *Burr v. Smith*, 21 Barbour, 262; such a payment absolutely extinguishes the debt and security; *Sandford v. M'Lean*, 3 Paige, 117, 122; *Banta v. Garmo and others*, 1 Sandford, 384; *Wilkes v. Harper*, 1 Comstock, 586; *The Bank of the United States et al. v. Winston's executors et al.*, 2 Brockenbrough, 252, 254; *Douglass v. Fagg*, 8 Leigh, 588, 602.

[In order however to render payment by a stranger, a satisfaction or extinguishment, it must be made on behalf of the debtor, and be authorized by him at the time, or ratified subsequently; *Belshaw v. Bush*, 11 C. B. 191; *Kemp v. Balls*, 10 Exchequer, 107; *Simpson v. Egginton*, Id. 845; for otherwise there will be no extinguishment, and the payment will remain without any effect, unless it was intended to operate a purchase. It must moreover be remembered, that the creditor is not only invested with an absolute control over the debt, while it remains in his own hands, but is entitled to transfer it to others by an equitable assignment, and hence when a payment by a third person is meant as a purchase and not as an extinguishment, the person who makes it, will stand in the position of an assignee, and be entitled to use all the remedies of the creditor, even when the transaction has been solely between themselves, and without the participation of the debtor; *Carter v. Jones*, 5 Bedell, 193; *Elkington v. Newman*, 8 Harris, 281; the right of subrogation being wholly independent of the consent or agreement of those against whom it is enforced and existing whenever the circumstances are such as to vest the property in the debt in those who seek to be subrogated; *Matthews v. Aiken*, 1 Comstock, 505; *Peake v. Dorwin*, 25 Vermont, 28; *Talmage v. Burlingame*, 9 Barr, 212. Hence a guarantor or surety will be equally entitled to the benefit of all the remedies and securities for the debt, whether he became responsible at the request of the creditor, or at that of the debtor; *Talmage v. Burlingame*; *Peake v. Dorwin*, 2 Am. Leading Cases, 408.

But while subrogation is a question

of law, or rather of equity, so far as it depends on whether the position of the claimant is such as to give him a right to be subrogated by purchasing the debt instead of extinguishing it; the question whether he meant to purchase or to extinguish, is a question of fact and not of law; it being settled that right and intention must both concur to make a case of subrogation. Hence a payment even by a surety will be an extinguishment, and consequently preclude the right to be subrogated, if the circumstances of the case or his accompanying declarations, are such as to show, that he meant to extinguish the debt and not to keep it alive for his benefit; *Kuhn v. North*, 10 S. & R. 399: Whether, a payment by a surety or other person who is *prima facie* entitled to subrogation, is a purchase or an extinguishment, should therefore be left to the jury when the question arises at law; *The Rockingham Bank v. Cloggett*, 9 Foster, 292; but as it seems with instructions, to presume that the party by whom the payment was made, meant to make it in the way to operate most beneficially, and consequently to keep the debt alive, unless there is enough to show the existence of a contrary intention; *Croft v. Poole*, 9 Watts, 451, 455.

In general, a surety is not entitled to the remedies of the creditor upon, or for any partial payment, nor unless the debt is fully paid and satisfied, and until satisfaction, the creditor will be left in the full control and possession of the debt and of the remedies for its recovery, although he may be bound to use them for the benefit of the surety; *Grove v. Brien*, 1 Maryland, 438; *The Neptune Ins. Co. v. Dorsey*, 3 Maryland, Ch. 334,

433; *Swan v. Patterson*, 7 Id. 164; *Hollingsworth v. Floyd*, 2 Harris & Gill, 87; *Cottrell's Appeal*, 11 Id. 294.]

The principles, and practice, in chancery, in regard to contribution among co-sureties, are similar in their nature to those relating to the indemnity of the sureties by the principal.

One surety who has paid the debt, or has paid more than his rateable share, is entitled to recover contribution, in equity, from his co-sureties; and where all are solvent, each is liable for his proportionate share; *Preston v. Preston et als.*, 4 Grattan, 89, 90; and contribution may be recovered in equity from the estate of a deceased surety, for a payment made after his death: *M'Kenna v. George*, 2 Richardson's Equity, 15, 17; *Wood v. Leland and others*, 1 Metcalf, 387, 389; though the contrary was held, Archer, J., dissenting, in *Waters v. Riley*, 2 Harris & Gill, 306, 311, 314. If one surety is insolvent, his share will in equity be apportioned amongst the solvent sureties; *Burrows and Brown v. M'Whann and Campbell*, 1 Des-saussure, 409, 424; *Breckinridge v. Taylor*, 5 Dana, 110, 111; *Hilton v. Crist*, Id. 384; except where the surety, seeking contribution, has himself been the cause of the insolvent surety's share not being made out of his estate; *Preston v. Preston et als.*; and the departure of a surety from the state is, in respect to the liability of the other co-sureties for his share, equivalent to his insolvency: *M'Kenna v. George*, 2 Richardson's Equity, 15, 18; *Bosley v. Taylor, &c.*, 5 Dana, 157. But a surety cannot compel a contribution from his co-sureties until he has paid the debt; *Wood v. Leland and others*; nor unless the principal be insolvent, or at least unless it ap-

pear that due diligence has been used, unsuccessfully, to obtain from him the sum claimed; *M' Cormack's Administrator v. Obannon's Executor and Devises*, 3 Munford, 484, 487; *Daniel v. Ballard*, 2 Dana, 296, 297; *Morrison v. Poyntz*, 7 Id. 307; *Rainey v. Yarborough*, 2 Iredell's Equity, 249, 251; *Allen v. Wood*, 3 Id. 386, 388: "the co-surety," said the court, in the last of these cases, "is bound to answer only in the place of his principal, and, if he is able, it is the duty of the surety, who has paid the debt, to look to him; if he is not able, he then, and only then, has a right to seek his redress from his co-surety. Nor can a co-surety speculate in the debt to the disadvantage of his co-sureties, their liability depending, in every instance, on what he has actually paid, and not on the amount of the debt or obligation; *Tarr v. Ravenscraft*, 12 Grattan, 642; *Edgerly v. Emerson*, 3 Foster, 355; *The Bank of Mobile v. Robertson*, 19 Alabama, 98.)

But this right of mutual contribution exists only among those who are co-sureties, that is, are sureties for the same thing, and are bound for the discharge of the same duty. And in determining whether different sets of sureties, are, in reality, co-sureties, and entitled to contribution among one another, equity has respect to substance and not to form—to the engagements which the sureties have entered into, and not to the instruments by which their engagements are manifested. If several persons, or several sets of persons, enter into engagements of suretyship, which are the same in their legal operation and character; that is, if they become sureties for the same duty, or debt, of, to, and for the same persons; though by different in-

struments, at different times, and without a knowledge of the obligations of each other; they will be bound to mutual contribution in equity; *Breckenridge v. Taylor*, 5 Dana, 110, 112; *Daniel v. M'Rae*, 2 Hawks, 590, 604; *dicta* in *Harrison v. Lane et al.*, 5 Leigh, 414, 417; in *Langford's Ex'or v. Perrin*, Id. 552, 558; and in *Scriven v. Joyner, Ex'r, and others*, 1 Hill's Chancery, 252, 260, 261; *Craig & Angle v. Ankeney*, 4 Gill, 226, 232. Thus, if there be several sureties in an official bond for the conduct of a sheriff, guardian, or cashier, and, at a subsequent time, another bond with sureties for the general conduct of the person, in the same form with the previous one, be given, all the sureties in both bonds are liable to contribution among one another; *Bell v. Jasper*, 2 Iredell's Equity, 597; *M'Kenna v. George*, 2 Richardson's Equity, 15, 17, 18; *Breckenridge v. Taylor*, 5 Dana, 110; *Bosley v. Taylor, &c.*, Id. 157; *Harris v. Ferguson*, 2 Bailey, 397, 401. And where a note with the names of certain persons upon it, who stood in the relation of co-sureties for the maker, has been offered for discount, and not been satisfactory, the name of another person has been procured, who also becomes a surety for the maker, all these persons are co-sureties with one another, and subject to mutual contribution, though the earliest sureties had no knowledge of the last's becoming a surety; *Stout v. Vause, &c.*, 1 Robinson's Virginia, 169; *Warner v. Price*, 3 Wendell, 397; *Norton v. Coons*, 3 Denio, 130; 2 Selden, 33; *Woodworth v. Bowers*, 5 Indiana, 277; *Sisson v. Barrett*, 6 Barb. 99; 2 Comstock, 406; see also *M'Neil v. Sandford*, 3 B. Monroe, 11, 12. "If the suretyship," said Stanard, J., in

Stout v. Vause, &c., "be substantially and in its nature that of one of several original sureties, on the payment under its obligation, the duty of contribution attaches to the other sureties." And whatever form the relation of the several sureties may bear upon the face of the instrument, parol evidence is admissible in equity to show that they were in fact co-sureties for the same thing. Where successive endorsers all endorse for accommodation of the maker, though at different times, and without communication or mutual understanding, they are in equity co-sureties, subject to common contribution; *Daniel v. M'Rae*, 2 Hawks, 590; and evidence is admissible to show that successive endorsers sign for accommodation, and thus to render them subject to contribution; *Love v. Wall*, 1 Id. 313. When co-sureties become bound in different bonds for the same duty, and the bonds are for different amounts, contribution between them is to be in the proportion of the penalties of the several bonds; *Bell v. Jasper*, 2 Iredell's Equity, 597, 601.

But if several, or successive, obligations of suretyship be not, in substance and nature, those of original sureties for the same thing, then, according to the circumstances, *either* there will be no recourse whatever, of contribution or indemnity, among the several sets of sureties, *or*, the original surety will be exempt from contribution to the latter surety and entitled to full indemnity from him, *or*, he may be bound to make full indemnity to the new surety, and of course not entitled to call on him for contribution. Each of these cases may be considered separately.

(1.) If the obligations of the differ-

ent classes of sureties, are for wholly distinct things, and have no relation to, nor operation upon, one another, though they may arise out of the same principal indebtedness, there is no claim, from one class upon the other, either for contribution or indemnity; *Langford's Ex'or v. Perrin*, 5 Leigh, 552, 558. In like manner, one set of sureties may be substituted for another, in the same duty, whose liability ceases, and then the latter set have no recourse against their predecessors; as in *Hutchins et al. v. M'Cauley*, 2 Devereux & Battle's Equity, 399, and *Longley v. Griggs*, 10 Pickering, 121. See also *Field v. Pelot*, 1 M'Mullan's Equity, 370, and *U. S. v. Wardwell et al.*, 5 Mason, 82, 85.

(2.) If one be bound, either personally or in his property, as original surety for a debtor, and the creditor bring suit against the principal, and the latter in the course of the legal proceedings, give a bail-bond, or prison-bonds bond, or appeal bond, or injunction bond, with a surety, this latter surety, upon paying the debt, has no recourse whatever against the original surety or his property; *Douglass v. Fagg*, 8 Leigh, 588; *Givens et al. v. Nelson's Ex'or et al.*, 10 Id. 382; *Langford's Ex'or v. Perrin*, 5 Id. 555, 557; *Stout v. Vause, &c.*, 1 Robinson's Virginia, 169, 180; *Patterson v. Pope*, 5 Dana, 241; *Smith v. Bing*, 3 Ohio, 33; *Daniel v. Joyner*, 3 Iredell's Equity, 513; *Burns and others v. The Huntingdon Bank*, 1 Penrose & Watts, 395; *Pott v. Nathans*; 1 W. & S. 155; *Roux v. Valandingham*, 13 Smedes & Marshall, 526. And the converse proposition, established in *Parsons v. Briddock*, 2 Vernon, 608, and approved by Sir William Grant, in *Wright v. Morley*,

11 Vesey, 12, 22, that the original surety, if he pays, has a right to enforce the obligation of the bail for his own full indemnity, is recognized in some of the preceding cases: and nothing can be more certain or obvious than the justice of that principle. The suit against the principal debtor was brought for the equal benefit of the creditor and of the original surety, who, in fact, has a right in equity to compel such a suit to be brought, or to institute it himself; the bail then engages for the sufficiency of the principal, in the matter of that suit, which is for the benefit of the creditor, and the original surety, and thus places himself in the position of the principal debtor in relation to them; and he becomes equitably answerable to them, because it was by his intervention that they were deprived of the power of making satisfaction from the principal. [Thus in *Brandenburgh v. Flynn*, 12 B. M. 397, the court said they knew of no principle, on which a subsequent surety who came to the aid of the debtor solely at his instance, and without the request or concurrence of the other sureties, could make them liable for indemnity or contribution, and that the cases had on the contrary established, that the prior sureties were under these circumstances entitled to be substituted to the rights of the creditor against the subsequent surety. It has accordingly been decided, that a surety in a bond given in the course of an application to chancery to stay proceedings at law, will have no right of recourse against a prior surety, whose obligation reaches back to the acquisition of the debt, or has been assumed at any intermediate period; *Bohannon v. Combs*, 12 B. M. 563; *Brandenburgh v. Flynn*.]

In Maryland, however, it has been decided that bail is not liable to the surety for *contribution*; see *Semmes, use of Baden*, v. *Naylor*, 12 Gill & Johnson, 358: but the courts of that state seem to have overlooked the true ground of the decision in *Parsons v. Briddock*.

(3.) If one set of sureties be bound for a debt, and then the obligee takes another bond, as supplemental security upon which the obligors are to be liable only in case the principal and sureties in the former bond fail to pay, the sureties in the former bond stand in the relation of principals to the new sureties, who are not bound with them, but for them: they have no claim for contribution against the new sureties, and are bound to them for full indemnity: and the secondary or supplemental nature of the second bond may be shown by a memorandum upon it, or by parol; *Craythorne v. Swinburne*, 14 Vesey, 160; *Harrison v. Lane et al.*, 5 Leigh, 414; *dicta* in *Langford's Ex'or v. Perrin*, Id. 552, 558, and in *Stout v. Vause, &c.*, 1 Robinson's Virginia, 169, 181. See the subject at large in *Field v. Pelot*, 1 M'Mullan's Equity, 370, where it is held that the question whether the second set of sureties are substituted in the place of the first, or are supplemental to them, or are joint sureties with them, depends upon the evidence of intention afforded by circumstances. Many instances of this supplemental suretyship occur. Thus, where the plaintiff became surety in an appeal from the County Court to the Circuit Court, and upon the affirmance of that decision, the defendant became surety on appeal to the Supreme Court, and judgment was again given against the appellant, and the plain-

tiff paid the debt, it was held that he was not entitled to recover contribution from the defendant, because they never were co-sureties; and the defendant was the surety of the plaintiff as much as of his principals, and if he had paid, would have been entitled to full indemnity from the plaintiff; *Cowan v. Duncan*, Meigs, 470, 472. See also, *La Grange v. Merrill*, 3 Barbour's Chancery, 625. So, where A. as surety, signs with B. a note payable to C., and C. endorses it for accommodation, C. is a supplemental surety to A., and A. has no right to contribution from him; this, at least, is the relation of A. and C. on the face of the paper, but it might be shown by parol evidence that A. and C. agreed to be common sureties for B.; *Smith v. Smith*, 1 Devereux's Equity, 173. So, where a note was signed by A. as principal and B. as surety, and then by C. as "surety for the above names," C. was held to be a supplemental surety, not liable to contribute to B.; *Harris v. Warner*, 13 Wendell, 400; *Thompson v. Sanders*, 4 Dev. & Bat. 404. And where a note was made by A. as principal, and B. and C. as sureties, and afterwards guarantied by a fourth person, the guarantor was held not to be liable to contribute to one of the sureties who had paid. "The sureties," said the Court, "were in effect principals, so far as regards the guarantor: the law raises no implied promise on the part of the guarantor to contribute in the case of a surety's paying the note, as it does on the part of a co-surety:" *Longley v. Griggs*, 10 Pickering, 121.

Co-sureties, otherwise entitled to contribution, may, by agreement among themselves, so far sever their unity of

interest and obligation, as to terminate the right of contribution. Thus, where three sureties agreed that the common liability should be divided, and that each should secure to the creditor the payment of one-third of the debt, and receive from him a discharge as to the residue, and this was executed on the part of one, and he obtained, with the assent of the other, a covenant from the creditor not to sue, it was held that one of the remaining sureties paying more than his share, could not call upon this one for contribution; *Moore v. Isley*, 2 Devereux & Battle's Equity, 372, 374. And, in some of the courts, it has been held, that whenever one surety is released by the creditor, under circumstances not to discharge the other, this other has no claim for contribution against the released surety; *Waggener v. Dyer*, 11 Leigh, 384, 391; *Bouchaud v. Dias*, 3 Denio, 238; though, of course, the remaining surety would be discharged from so much of the debt as would properly have fallen upon the one who was released; *Waggener v. Dyer*. But in *Boardman v. Paige*, 11 New Hampshire, 432, 435, it was held that a release of one surety will not discharge him from liability to contribute to another, who from the insolvency of one of the remaining sureties may pay beyond his share: and this seems to be the necessary result, unless it be considered that the discharge of one surety, without the consent of the others, releases the remaining ones from the obligation to pay more than their share in relation to the whole number originally bound; 1 American Leading Cases, 355, 4th ed.

For the purpose of enforcing contribution among co-sureties, one surety

who pays the debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the principal debtor, and though payment may have discharged the security at law, equity will keep it alive for this purpose: and this applies to bonds, judgments, decrees, mortgages, and all other securities whatsoever. See *Cuyler v. Ensworth*, 6 Paige, 32, 33; *Cheesebrough v. Millard*, 1 Johnson's Chancery, 409, 413; *Scribner v. Hickok*, 4 Id. 531, 532; *Lawrence v. Cornell*, Id. 545; *Himes v. Keller*, 3 Watts & Sergeant, 401, 404; *Croft v. Moore*, 9 Watts, 451. Thus, where a judgment had been recovered against several sureties and their principal jointly, and, the principal being insolvent, two sureties had paid a considerable part of the judgment, and the administrator of another surety having paid a small balance upon it, had procured satisfaction of the judgment to be entered of record, it was held that the sureties who had paid more than their share, were entitled to be subrogated in the original judgment as against the estate of the surety who had paid less, and for that purpose to have the judgment considered in equity as subsisting and in force; *Burrows & Brown v. M^cWhann & Campbell*, 1 Dessausure, 409. In *Cuyler v. Ensworth*, a surety, who had paid a joint judgment against himself and other sureties, sought to reach, through its medium, equitable assets of a co-surety; and, as by the practice of the court, that cannot be done until execution has been issued, and returned unsatisfied, it was objected that this was impracticable, as the judgment was satisfied at law; but

the Chancellor said, that a court of equity looked to the substantial rights of parties, without regard to mere matters of form, and that, if it had been necessary, he would have restrained the defendant, by injunction, from contesting the validity of the execution at law; and it was decided that the sureties who had paid were to be regarded as assignees in equity of the judgment, and might file a creditor's bill in their own names. And the general principle that a surety paying the debt, stands precisely in the situation of the creditor in relation to the other sureties, for the purposes of contribution, is settled in *Lidderdale v. Robinson*, 2 Brockenbrough, 160; 12 Wheaton, 594. A statute of Virginia had provided that debts on bills of exchange should have the rank of judgment debts in the distribution of assets; and, in that case, it was decided that the claim of an endorser, a surety, who had paid the bill, against the estate of another endorser, a co-surety, for contribution, was entitled to the same rank of a judgment debt. "The principle which the cases decide," said Chief Justice Marshall in the court below, "is this: where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this sup-

position, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent, his claim upon his co-surety is precisely as valid as upon his principal." And this was fully sustained in the Supreme Court.

It should be observed, that as subrogation is the creature of equity, it will never be enforced against the superior equities of third persons; *Patterson v. Pope*, 5 Dana, 241; *Erb's Appeal*, 2 Penrose & Watts, 296; *Goswiler's Estate*, 3 Id. 300; *Himes v. Keller*, 3 Watts & Sergeant, 401, 404; *Houston v. The Bank*, 25 Alabama, 260; *Kyner v. Kyner*, 6 Watts, 221, 227; *Bank of Pennsylvania v. Potius*, 10 Id. 148, 152; *Crump et al. v. M^r Murtry*, 8 Missouri, 408, 413; *Union Bank of Maryland v. Edwards*, 1 Gill & Johnson, 346, 365; *Hardcastle v. Commercial Bank of Delaware*, 1 Harrington, 374, 378, note; nor to the prejudice or injury of the creditor, and therefore not until the creditor is fully paid and satisfied; *Hollingsworth v. Floyd*, 2 Harris & Gill, 87; *Swan v. Patterson*, 7 Maryland, 164, ante; *Rice v. Downing*, 12 B. Monroe, 258. [It was however said, in *Rice v. Downing*, that the surety might, on making a payment, on account, or partial payment, or even before anything had been paid, call on the creditor to use all his remedies to compel the discharge of the debt by the principal, ante, 144; and it is plain that the distinction between this and subrogation is extremely thin: the one being a right to sue in the name of the creditor, the other to compel the creditor to proceed by suit,

and the object of both being the safety or indemnity of the surety.]

It has also been said, that subrogation will not be enforced in the face of a legal right; and that if the law has decided against a surety's claim, equity will not give him that claim through the medium of subrogation; *Fink v. Mahaffy*, 8 Watts, 384.

[The right of a surety to contribution is an equity, and may, therefore, like most other equities, be rebutted by oral testimony, even when the contract out of which it grows is in writing; and hence a parol agreement between the sureties to a bond or other written instrument that one shall be saved harmless by the others, or shall not be liable to them for contribution, will be a bar to a suit in derogation of the agreement; *Barry v. Rawson*, 2 Kernan, 462; *Apgar v. Hiler*, 4 Zabriske, 702.]

It is a settled principle of equity, that if one of several co-sureties subsequently take a security from the principal, for his own indemnity, it enures to the common benefit of all the sureties: if, therefore, the principal convey property, by a deed of trust, expressly for the benefit of one of the sureties only, the others have an equity to come upon it to the same extent that he can; *West v. Belches*, 5 Munford, 187; *M' Mahon, &c. v. Fawcett, &c.*, 2 Randolph, 514; *Fagan v. Jacocks*, 4 Devereux, 263; *Gregory v. Murrell*, 2 Iredell's Equity, 233, 236; *Field v. Pelot*, 1 M'Mullan's Equity, 370; *Hinsdill v. Murray et al.*, 6 Vermont, 136, 150; *Elwood v. Deifendorf*, 5 Barbour's S. Ct. 399, 405; *Rice v. Morton*, 19 Missouri, 261; *Steele v. Mealing*, 24 Alabama, 285; *Tyus v. De Jarnette*, 26 Id. 280. "Sureties," said Kennedy, J., "are

bound to observe good faith towards each other; and when funds are placed by the principal in the hands of one surety to be applied either to the payment of the debt, or for the purpose of indemnifying him against any loss that may arise from the suretyship, he must be considered as holding them for the common benefit of all concerned. The giving of the funds was the act of the principal, who was equally bound to indemnify all his sureties alike; and upon him, as well as to all his means for that purpose, each of them had an equal and just claim; it is unjust and inequitable that one surety, without the consent of his co-sureties, should derive any exclusive benefit from the act of the principal in giving up what he might and ought to have applied for the common benefit of all;" *Agnew v. Bell*, 4 Watts, 31, 33. "The indemnity, which one surety takes," says Henderson, J., in *Moore v. Moore*, 4 Hawks, 358, 360, "is reached in favor of his co-surety, upon the ground, either that it was intended for the benefit of all, or that the taking it was a fraud upon the others. In such cases, courts of equity convert him into a trustee, not permitting him to allege his own turpitude or selfishness as a protection; for they enter into the agreement under a belief of perfect equality, trusting apparently to the same laws of indemnity, and to the united exertions of each other, to avoid harm severally; therefore, to take an indemnity is a fraud upon the rest, and more especially, as it lessens the ability of the principal to indemnify the others, and if taken without such secrecy, it is presumed to be designed for the benefit of all." See, also, *Hall v. Robinson*, 8 Iredell, 56. But

this equity which arises upon the simple relation of co-sureties, may be removed by the agreement of the parties, either before the obligation is assumed, or afterwards. An agreement for a separate indemnity, entered into, before one becomes surety, with the knowledge and consent of the other, will be good, and the latter will be entitled only to the surplus after the former is satisfied; *Moore v. Moore*; see also *Thompson et al. v. Adams et al.*, 1 Freeman's Chancery, 225, 228: and it has been held, also, that after two persons have become sureties for a common principal, they may, by agreement, renounce their right to take equal benefit from any securities either may obtain, and each may undertake to look out for himself, exclusively, for indemnity from the principal or for contribution from another co-surety; *Tyus v. De Jarnette*, 26 Alabama, 280; but such an agreement must be distinctly proved; *Long v. Barnett*, 3 Iredell's Equity, 631, 634; *Tyus v. De Jarnette*. In *Gould v. Fuller*, 18 Maine, 364, 367, where the general principle was admitted, that securities received by one surety before payment, enure in equity to the equal benefit of all, it was yet held that if, after one surety has paid the debt, he receives from the principal, money expressly to indemnify him for his share of the payment, he may sue his co-surety for his contributory share: but this seems to be carrying too far the exception to a settled and salutary principle of equity. If the principal has given securities to one surety, the latter cannot in chancery recover contribution from his co-surety, without accounting for the property, and either showing how much he received upon it, and making a rateable

allowance of the proceeds, or showing that he could not by reasonable diligence realize from it; *Goodloe v. Clay*, 6 B. Monroe, 236; *Morrison v. Poyntz*, 7 Dana, 307, 310; *Dennis v. Gillespie*, 24 Mississippi, 58; *Steele v. Mealing*, 24 Alabama, 285; *Morrison v. Taylor*, 21 Id. 779; and any loss which may arise from his neglect or misconduct, will be a defence to the extent of the loss; *Taylor v. Morrison*, 26 Alabama, 728; *Steele v. Mealing*; *The State Bank v. Roseman*, 8 English, 631; *Steele v. Brown*, 18 Alabama, 700; *Zeiter v. Pierce*, 11 B. Monroe, 379; *Crow v. Murphy*, 12 Id. 444; *Chilton v. Chapman*, 13 Missouri, 470; 2 American Leading Cases, 355, 4th ed.; *Hilton v. Crist*, 5 Dana, 384, 389. The surety receiving securities, is a trustee for his co-sureties, and is bound to such discreet and reasonable use of them as would be required from a trustee, but no greater: *Carpenter v. Kelly*, 9 Ohio, 106; see *Pool v. Williams*, 8 Iredell, 286.

In like manner, the principal creditor is in equity entitled to the full benefit of any security given by the debtor to a surety for his indemnity and for the discharge of the debt; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence; *Maure v. Harrison*, 1 Equity Cases Abr. 93, pl. 5; *Wright v. Morley*, 11 Vesey, 12, 22; *Moses v. Murgatroyd*, 1 Johnson's Chancery, 119, 129; *Philips v. Thompson*, 2 Id. 418, 422; *Pratt v. Adams*, 7 Paige, 617, 627; *Curtis v. Tyler*, 9 Id. 432, 435; *Ten Eyck v. Holmes*, 3 Sandford, 428, 429; *Roberts v. Colvin*, 3 Grattan, 359, 363; *Toulmin et al. v. Hamil-*

ton et al., 7 Alabama, 362, 367; *Ohio Life Ins. Co. v. Ledyard, &c.*, 8 Id. 866, 872; *Paris v. Hulet*, 26 Vermont, 308; *Riddle v. Bowman*, 7 Foster, 236; *Haven v. Foley*, 19 Missouri, 632; *Aldrick v. Martin*, 4 Rhode Island, 520. In fact, a court of equity, under the title of subrogation, exercises a paramount control, for purposes of justice and convenience, in respect to the relation of principal and sureties; "if property is pledged to either the creditor or a surety, though not to the person seeking to charge it, it may be reached by substitution in a court of equity, without regard to the intention of the contracting parties;" per Parker, J., in *Hopewell et al. v. Bank of Cumberland*, 10 Leigh, 206, 226; see also *Mc Collum v. Hinckley & others*, 9 Vermont, 143, 149. "This," says Parker, J., (p. 221,) "arises not from any notion of mutual contract between the parties, that in providing for the surety, the creditor shall be equally provided, but from a principle of natural equity independent of contract; namely, that to prevent the surety from being first harassed for the debt or liability, and then turning him round to seek redress from a collateral security given by the principal, a court of equity will authorize, and even encourage, the creditor to claim through the medium of the surety, all the rights he has thus acquired, to be exercised for his benefit, and in discharge of his obligations." This equity of the creditor's rests upon the doctrine of subrogation or substitution; and therefore the creditor cannot claim the security unless the surety had a right to come upon it. *Bibb v. Martin*, 14 S. & M. 87; *Bush v. Schups*, 4 Cushman, 463. If, therefore, security be given to a

contingent surety, such as an endorser of negotiable paper, to indemnify him, and his liability never becomes absolute, but is discharged from default in giving notice, the payee cannot claim the benefit of the security, because being appropriated only for the case of the endorser's becoming liable, the appropriation, in truth, never took effect at all; *Hopewell et al. v. Bank of Cumberland*; *Bank of Virginia v. Boisseau et al.*, 12 Leigh, 387; see, also, *Ohio Life Ins. & Tr. Co. v. Reeder et al.*, 18 Ohio, 35, 46.

Formerly, no action at law could be maintained against the principal by a surety who had paid the debt, the remedy being only in equity; but in modern times, when many equitable claims are enforced at law, through the medium of implying promises to do what the party is bound in justice and equity to do, it is settled, that when a surety becomes bound for a principal, and at his request, the law implies a promise of indemnity, and an action of assumpsit may be brought. The surety, therefore, may pay the debt at any time after it becomes due, without waiting to be sued, and may then maintain an action for money paid; *Mauri v. Heffernan*, 13 Johnson, 58, 75; *Odlin v. Greenleaf*, 3 New Hampshire, 270; *Goodall v. Wentworth*, 20 Maine, 322, 325; *Frazer v. Goode*, 3 Richardson, 199; *Stinson v. Brennan*, Cheves's Law, 15; *Williams's Adm'rs v. Williams's Adm'rs*, 5 Ohio, 444, 445; or may sue on the implied promise to indemnify; *Babcock v. Hubbard*, 2 Connecticut, 536, 539; *Ward v. Henry*, 5 Id. 596. And when the debt is satisfied by an extent or sale of the surety's land, he may recover either at law or in equity,

although his remedy once lay solely in the latter jurisdiction; *Hulet v. Soulard*, 26 Vermont, 295; *The Wesley Church v. Moore*, Barr, 273; *Lord v. Staples*, 3 Foster, 448; *Randall v. Rich*, 11 Mass. 498; and may even declare in general or *indebitatus assumpsit*, and give a satisfaction produced by or resulting from a sale or conveyance of land, in evidence under a bill of particulars setting forth a payment in money, without resorting to a special count; *Bonney v. Seely*, 2 Wend. 481. The implied promise or obligation to indemnify, arises as soon as the suretyship is entered into; *Howe v. Ward*, 4 Greenleaf, 195; *Appleton & another v. Bascom & others*, 3 Metcalf, 169: but no action at law can be brought by the surety until after he has paid or extinguished the debt; *Powell v. Smith*, 8 Johnson, 249, 252; *Pigou v. French*, 1 Washington's C. C. 278; *Miller v. Howry*, 3 Penrose & Watts, 374, 380; *Ingalls v. Dennet*, 6 Greenleaf, 79; *Hall and others v. Thayer*, 12 Metcalf, 131, 135; *Shepard v. Ogden*, 2 Scammon, 257, 260: see also *Jones and another v. Trimble*, 3 Rawle, 381, 388; *Williams's Adm'rs v. Williams's Adm'rs*, 5 Ohio, 444, 446; *Elwood v. Deifendorf*, 5 Barbour's S. Ct. 399, 410, *ante*, 143. In *assumpsit*, the surety may recover what he has paid, with interest and costs; *Wynn, Adm., v. Brooke et al.*, 5 Rawle, 106, 108; *Hayden v. Cabot*, 7 Massachusetts, 169; *Cleveland v. Covington*, 3 Strobhart, 184; and even as it has been said, counsel fees and other incidental expenses; *Fletcher v. Jackson*, 23 Vermont, 581; *Marsh v. Hamington*, 18 Id. 150; although this would seem to be somewhat doubtful, *post*. The surety of a

surety, upon paying the principal's debt, may also maintain *assumpsit*; *Hall v. Smith*, 5 Howard, 96, 102. If the sureties pay separately, their legal demands against the principal, are in their nature several, and the sureties cannot join in suing the principal; *Messer v. Swan*, 4 New Hampshire, 482, 488; *Lombard v. Cobb*, 14 Maine, 222; *Gould v. Gould*, 8 Cowen, 168; but if the debt is paid by their joint negotiable note, and also, it seems, if money paid is owned by them jointly, or raised on their joint credit, their proper remedy is by joint action; *Pearson et al. v. Parker*, 3 New Hampshire, 366; *Day v. Swann*, 13 Maine, 165; *Doolittle v. Dwight and another, Adm'r.*, 2 Metcalf, 561; *Appleton & another v. Bascom & others*, 3 Id. 169, 172; see *Lowry v. Lumbermen's Bank*, 2 Watts & Sergeant, 210, 215. But a joint action will never lie by one surety against the principal and other sureties; *Lapham v. Barnes et al.*, 2 Vermont, 213, 218; *Elwendorph v. Tappen & others*, 5 Johnson, 176; even when the plaintiff has signed expressly as surety, while the defendants have affixed their signatures without any such qualification; *M^r Gee v. Prouty*, 9 Metcalf, 347. If a surety is bound for two joint principals, he may sue them jointly for indemnity, unless some agreement has been made inconsistent with this implied liability; *Duncan v. Keiffer*, 3 Binney, 126, 129.

[*Assumpsit* for money paid, laid out, and expended, may be maintained whenever a payment has been made in discharge of a legal obligation resting upon both plaintiff and defendant, which ought as between themselves to have been borne by the defendant, or

in pursuance of an express or implied request by the defendant; although there may have been no liability either on his part or on that of the plaintiff; either ground being sufficient without the other; and proof of liability necessary only when there has been no request, and when the payment would otherwise have been merely voluntary; *Alexander v. Vance*, 1 M. & W. 571; *Brittain v. Lloyd*, 14 Id. 762; *Shaw v. Lowd*, 12 Mass. 447; *Peaselee v. Breed*, 10 New Hampshire, 48. Hence, the right of a surety to a recovery against the principal, will not, as it would seem, be affected by showing that he went on to make payment after he had been informed that the debt was usurious, and consequently destitute of legal validity, unless the information was accompanied with directions not to pay, and thus amounted to a revocation of the authority implied in the original request that he would consent to make himself answerable as surety. And payment of a note barred by the statute of limitations, would probably fall within the same principle, in the absence of a distinct notification of the intention of the principal to plead or rely on the statute as a defence; *Elkinton v. Nichols*, 7 Gill, 85. In *Whitehead v. Peck*, 1 Kelly, 141, 151, however, a different view was taken, and the payment by a surety of a usurious obligation, with notice of its true nature, said to be essentially invalid, and to give the surety no right to indemnity or re-imbursement from the principal.

The indemnity of the surety should, as it would seem, extend beyond the debt itself, and embrace all the costs, which have been recovered against him by the creditor; *Wynn v. Brooke*,

5 Rawle, 106; *Hayden v. Cabot*, 17 Mass. 167; at all events, when the promise to indemnify is express, and not merely implied by the law; *Bonney v. Seeley*, 2 Wendell, 481; unless they have been incurred needlessly or vexatiously by the surety, in opposition to, or without, the wish or assent of the principal; and some of the cases go still further, and hold the surety entitled to reimbursement for counsel fees and other incidental expenses of the same nature; *Marsh v. Harrington*, 18 Vermont, 150; *Fletcher v. Jackson*, 23 Id. 581. But costs inflicted *in invitum*, by the act of the law, obviously stand on a different footing from payments made voluntarily as a matter of choice or discretion, and the better opinion would seem to be that counsel fees cannot be included in the recovery against the principal, as not being a necessary or legal consequence of his default; and being merely so much money laid out for the benefit of the surety; *Wynn v. Brooke*; and there are several decisions which tend to throw a doubt on the right of the surety even to costs; *Walker v. Hatton*, 10 M. & W. 249; *Penley v. Watts*, 7 Id. 610; *Tindall v. Bell*, 11 Id. 228; *Short v. Halloway*, 11 A. & E. 31; *Lowell v. The Boston & Lowell R. R. Co.*, 23 Pick. 24; *Greely v. Dow*, 2 Metcalf, 179. "No man," said Lord Denman, in *Short v. Halloway*, "is entitled to inflame his account against another by incurring additional expense in an unrighteous resistance to an action which he cannot defend;" and although this language was held in a suit brought to recover compensation for damages which had been recovered against the plaintiff, in consequence of the failure of the defend-

ant to fulfil a covenant to repair, it would seem applicable to the costs of a suit against a surety. But there is at least as much truth in the remark of Gibson, C. J., in *Wynn v. Brooke*, that the surety may be unable to prevent or anticipate the infliction of costs by payment, and that the loss should consequently fall upon the principal, whose duty it was to have paid, and whose *laches* have occasioned the injury. The principle is clear, although there may be some difficulty in its application, and the compensation of the surety will be limited in general to those injuries, which are the legal and necessary consequence of the non-payment of the debt, and consequently will not extend to the loss which he may sustain by the interruption of his business, or even by the sacrifice of his goods at a forced sale, under an execution issued by the creditor; *Hayden v. Cabot*, 17 Mass. 167.]

It is equally well settled, at the present day, that *indebitatus assumpsit* will lie by one surety who has paid more than his share, to recover contribution from his co-surety: see *Johnson v. Johnson*, 11 Massachusetts, 359, 361; *Norton v. Soule*, 2 Greenleaf, 341, 343, 344. This implied obligation is founded upon an equitable duty, which the sureties are supposed to be cognizant of, and assenting to, at the time they enter into the contract of suretyship; and, according to the modern and better opinion, the legal rights and duties being founded upon equity, are co-extensive with the equitable claims subsisting among the parties, and are in all respects similar to them. See *Moore v. Moore*, 4 Hawks, 358, 360; *Sherrod v. Woodard*, 4 Devereux, 360, 361; *Morrison v. Poyntz*, 7 Dana,

307; *Bezzell, Ad'mr, v. White*, 13 Alabama, 422; *Fletcher v. Grover*, 11 New Hampshire, 369, 374; *Boardman v. Paige*, Id. 432, 439; *Agnew v. Bell*, 4 Watts, 31, 32; *Taylor v. Savage*, 12 Massachusetts, 98, 102; *Mason v. Lord*, 20 Pickering, 447, 449. "The action of assumpsit for contribution," says C. J. Shaw, in the last case, "is founded purely on equitable principles. It proceeds upon the broad ground, that when two or more are subject to a loss or burden common to all, and one bears the whole or a disproportionate part, it lays an equitable claim for contribution, from those who are thereby proportionably relieved." The principle, that contribution may be enforced, whether the sureties are bound jointly, or severally, whether by the same or different instruments, and whether with or without mutual knowledge of one another's suretyship, is settled in relation to assumpsit at law, as well as in regard to proceedings in equity; *Norton v. Coons*, 3 Denio, 130; *Harris v. Ferguson*, 2 Bailey, 397, 400. Assumpsit to recover contribution will lie, also, as well where there are several sureties, as where there are only two; *Foster v. Johnson*, 5 Vermont, 60, 63; and it will lie against the representatives of a deceased surety, for a payment after his death, because the implied obligation arose at the time the common suretyship was entered into; *Bachelor v. Fiske et al. Ex'rs*, 17 Massachusetts, 464; *Bradley v. Burwell*, 3 Denio, 62, 66; *Malin and another v. Bull*, 13 Sergeant & Rawle, 441; *McKenna v. George*, 2 Richardson's Equity, 15, 18; *Aiken v. Peay*, 5 Strobhart, 15; see, also, *Stothoff v. Dunham's Executors*, 4 Harrison, 182; and according

to the weight of authority, if one of several sureties be insolvent, contribution at law, as well as in equity, will be according to the number of those who are solvent; *Harris v. Ferguson*, 2 Bailey, 397, 401; *Mills v. Hyde*, 19 Vt. 60, 63; *Strong et al. v. Mitchell et al.*, Id. 644, 647; and removal from the state is for this purpose, equivalent to insolvency; *Boardman v. Paige*, 11 New Hampshire, 432, 440; but in some other courts it has been said that there is in this particular a difference between law and equity, and that a surety who has paid the debt, can at law recover only a proportional contribution, according to the whole original number of sureties; *Stothoff v. Dunham's Ex'rs*; *Parker v. Ellis*, 2 Sandford's S. Ct. 224; see *Powell v. Edwards*, 2 B. & P. 268; see dictum in *Croft v. Moore*, 9 Watts, 451, 453, and see *Hall v. Robinson*, 8 Iredell, 56, 59. A surety need not wait to be sued, but as soon as the debt is due, he may pay it, and bring an action of contribution; *Bradley v. Burwell*, 3 Denio, 62, 69; and it has been held that he may pay or compromise the debt before it is due, and as soon as it is due may sue for contribution; *Craig v. Craig*, 5 Rawle, 91, 98: but he cannot recover unless it appear that he was bound for payment, for if he pay a debt which he was not legally compellable to do, he cannot recover contribution; *Skillin v. Merrill*, 16 Massachusetts, 40; see *Cave, use of Wallace, v. Burns*, 6 Alabama, 780, 782, *ante*. And as this right of action rests upon an equitable claim to be compensated for a disproportionate suffering from a common burden, it will not exist, except for the excess which the surety has paid beyond his just share; *Fletcher v. Grover*, 11 New Hamp-

shire, 369; nor will it lie where the party claiming has in fact been reimbursed and has sustained no loss; *Mason v. Lord*, 20 Pickering, 447, 449; nor where the surety who has paid is indebted to the principal in more than the amount of the debt; *Bezzell, Adm'r, v. White*, 13 Alabama, 422, 423: and if one surety has received any property from the principal for the purpose of indemnifying him, he must account for the proceeds of it, as for so much received on common account; *Bachelor v. Fiske et al. Ex'rs*, 17 Massachusetts, 464, 470; *Fletcher v. Grover*; *Agnew v. Bell*, 4 Watts, 31, 34. A surety who has resisted an action brought by the creditor, cannot, it has been said, recover from his co-surety contribution for the costs, unless he defended at the co-surety's request; *John, Adm'r, v. Jones*, 16 Alabama, 454, 462; but in *Fletcher v. Johnson*, 23 Vermont, 581, co-sureties were held to be entitled to contribution, not only for costs, but for counsel fees and other incidental expenses. In equity, as has been seen, one surety does not recover contribution from his co-surety, without showing that the principal is insolvent, or unable to pay; and the Kentucky courts have held that the same rule must prevail at law, since the legal and equitable liability should be the same; *Pearson & Co. v. Duckham*, 3 Littell, 385, 386; *Poignard v. Vernon, &c.*, 1 Monroe, 45, 47; *Morrison v. Poyntz*, 7 Dana, 307; *Atkinson v. Stewart, &c.*, 2 B. Monroe, 348, 350; *Crow v. Murphy*, 12 Id. 444; but in other courts, it has been held, that, at law, a surety has a right of action against his co-surety for contribution, immediately upon payment of the debt, and may recover without

showing the insolvency of the principal; *Roberts v. Adams*, 6 Porter, 361; *Couch v. Terry's Adm'rs*, 12 Alabama, 225, 227; *Odlin v. Greenleaf*, 3 New Hampshire, 270, 271; *Goodall v. Wentworth*, 20 Maine, 322, 324; *Judah v. Mieure*, 5 Blackford, 171; *Sloo v. Pool*, 14 Illinois, 46; and see *Powell v. Edwards*, 2 B. & P. 268. And it would seem that these latter cases are correct, and that there is a distinction between law and equity, not in principle, but growing out of the difference in the modes of proceeding. Probably the obligation of co-sureties, both at law and in equity, is to make rateable contribution, without regard to the ability of the principal: but in equity, as the principal debtor is made a party to the bill for contribution, and as the surety, sought to be made liable, would have an immediate claim against him, the court, to prevent circuity of action, will require the principal to be charged, unless it appear that he is insolvent: but, at law, where the parties must be sued in successive actions, it would often be mischievous to prevent the paying surety from bringing an action against his co-surety until he has pursued the principal to insolvency; and this seems to be admitted in *Caldwell v. Roberts*, 1 Dana, 355, 357.

Though relief is now freely given at law, the jurisdiction of Chancery on these subjects remains unimpaired. "The right to afford contribution originally belonged to a Court of Equity, and the jurisdiction now assumed by courts of law to enforce contribution in some cases, does not affect the jurisdiction originally belonging to a court of equity;" *Wayland v. Tucker et als.*, 4 Grattan, 268, 269; *Couch v. Terry's Adm'rs*, 12 Alabama, 225, 228.

The jurisdictions of the two tribunals are declared to be concurrent, in *Mitchell's and Davis's Adm'rs v. Sproul*, 5 J. J. Marshall, 264, 270, and *Hickman, &c. v. McCurdy*, 7 Id. 555, 559. Indeed the principle is general, that where a court of equity has had jurisdiction of a subject, it will retain it, although the original ground of jurisdiction, the suitor's inability to recover at law, no longer exist: *King v. Baldwin*, 17 Johnson, 384, 388; *Hawley v. Cramer*, 4 Cowen, 719, 727.

[The relation of principal and surety, and that which exists between co-sureties, lies in a great measure without the contract with the creditor, although founded upon and growing out of it, and may consequently be proved or negatived by extrinsic and unwritten evidence, even when the contract itself is in writing. The main and obvious purpose of reducing an agreement to writing, is to perpetuate and define the obligations which it sets forth, or calls into being, between the parties who contract with and bind themselves to each other in and by the agreement, and not to express the collateral relations which exist, or the duties which may arise between parties of the same part. Hence, it has been held that the obligors in a bond, or makers of a joint and several promissory note, have a right to show that the whole burden of the obligation, into which they have entered, should be borne as between themselves, by one or more of their number, to the exclusion of the others, and that the latter are consequently entitled to an indemnity for any portion of it, which may have been thrown upon them, by the default of the former, *Barry v. Ranson*, 2 Kernan, 462. And it is equally well settled that

this may be done not only when the parties appear on the face of the instrument as co-contractors, but when the obligation of one is primary, and that of the other merely contingent and secondary, and that the amount paid by the maker of a note, or the acceptor of a bill may be recovered from the drawer or endorser, on proof that the signature of the plaintiff was affixed without consideration, and merely for the accommodation of the defendant; *The Grafton Bank v. Kent*, 4 New Hampshire, 221; *Griffith v. Reid*, 21 Wend. 502. It would seem to follow, and has indeed been decided in several instances, that the addition of the words "security," "surety," or of other words of like import, to the signatures of one or more of the parties, will not be conclusive, either in their favor, or against them, and that evidence may still be given to show the relation which really exists between them, and that those who have signed as sureties, are principals; *Apgar v. Hiler*, 4 Zabriskie; *Robinson v. Lyle*, 10 Barbour, 512; or even that one who appears as principal, is in fact but a surety, and consequently cannot be made answerable as a principal, by those who have expressly signed as sureties: *M^cGee v. Brouty*, 9 Metcalf, 347.

The right of co-sureties to contribution, is governed by the same principles, and may, like most other equities, be rebutted by parol evidence, even when it is founded upon a written obligation. Hence, an action brought by one surety on a note or bond, who has paid the whole amount due on the instrument, against another for indemnity or contribution, may be defeated on the one hand, by showing that the defendant made himself

answerable at the request of the plaintiff, and on the faith of an express promise that the latter would bear the whole burden of the obligation; *Barry v. Ranson*, 2 Kernan, 462; *Apgar v. Hiler*, 4 Zabriskie, 812; and carried on the other beyond the limits of a claim for contribution, and to the full amount necessary for indemnity, by proof that the defendant is in fact a principal, although both parties may have signed expressly as "sureties:" *Apgar v. Hiler*. A similar course was pursued in *M^cGee v. Routy*, 9 Metcalf, 347; and a suit for indemnity by one of the makers of a note who had signed as "surety," against the others who had affixed their signatures without any such qualification, allowed to be defeated, by proof that one of the defendants was in fact a surety, and therefore could not be made liable for anything more than contribution, or joined with the other in the same action.

In order, however, for a promise or agreement to exempt a surety from liability for contribution, or entitle him to treat other sureties as principals, it must be made by some one who is entitled to make it, and to dispose at pleasure of the debt, and the obligation given by the parties for its payment; and although this right may, and no doubt does, reside in the creditor, it cannot be exercised solely by the principal, who has no power to control, or in any way alter the relations between those who have entered into the contract as sureties. The law was so held in *Norton v. Coons*, 3 Denio, 130; 2 Selden, 33; and an assurance by the first of three makers of a joint and several note, that the third would incur no responsibility by his signature; and that in the event

of a default in payment, the whole burden should fall on the second, who was well able to bear it; held to be no defence to a suit for contribution, brought by the second against the third, although the latter signed on the faith of the assurance, and some time after the execution of the note by the other makers. But, although a surety cannot rely on the representations or promises of the principal, as a defence against his co-sureties, his liability will be limited by, and can in no case be carried further than the terms of the contract by which it is assumed; and hence, when one of the makers of a joint and several promissory note appends the words "surety for the above names," to his signature, he will not owe contribution to those whose names are prior to his own, even when they have signed expressly as "sureties;" *Harris v. Warner*, 13 Wend. 400; *Thompson v. Sanders*, 4 Dev. & Bat. 404. But the mere addition of the word "surety," to the signature of one of the makers of a note, will not, it seems, be enough in itself to subvert the relation of equality between himself and other sureties, whose signatures have been affixed to the instrument without qualification, or to defeat a claim on their part, for contribution; *Sisson v. Barrett*, 6 Barbour, 199; 2 Comstock, 406; even when he signs the instrument after them, and in consequence of the refusal of the creditor to take the instrument unless his name is added; *Woodworth v. Bowers*, 5 Indiana, 277; although the defendant may, under these circumstances, resort to parol evidence, to show the nature of his contract, and that he is entitled to treat all the other parties to the instrument as principals, with-

out regard to their relations as between themselves; *Robison v. Lyle*, 10 Barbour, 512; *Darragh v. Osborne*, 2 Halsted, 71.

Dicta may be found in *Norton v. Coons*, 3 Denio, 130, and *Harris v. Warren*, 13 Wend. 400, that one of several sureties who refuses to stand on the same footing with the rest, and stipulates that they shall be principals as to him, as well as sureties for the principal, cannot call upon them for contribution, if subsequently compelled to make payment of the debt. But the justice of shutting a surety out from a claim against others, because he has stipulated that they shall have no recourse against him, would seem very questionable, except when his liability has been assumed solely at the instance of the principal, and without the participation or request of the creditor. The right of a creditor, to procure a guaranty or insurance of the obligations of those who have made themselves liable, either as principals or sureties, is as indisputable as that payment will place the guarantor, or insurer, in the position of a purchaser, and entitle him to subrogation to the debt against all who are in any way answerable for its payment; *post*, vol. 2, note to *Alldrich v. Cooper*. And the case would seem to be nearly the same, when the creditor calls on the debtor to find additional security, and a third person thereupon adds his name as surety, on the faith of an express or implied promise, that those who have already executed the contract shall still remain primarily answerable for its fulfilment, and that he shall be entitled to look to them for re-imbursement, for any loss which happens through their default.

The question arose, and was carefully examined, in the case of *Darrah v. Osborne*, 2 Halsted, 71, where a note made by A., as principal, and B. as surety, in payment of an antecedent debt to C., having been taken by M. for a debt due to him by C., on condition that C. would write his name under those of A. and B., and thus couple his liability with theirs; C. was held entitled to recover the whole amount from B.; the ground of the decision being, that where the assignment or transfer of a debt is accompanied by a guaranty or engagement that it shall be paid, payment

under the guaranty will replace the guarantor in the position which he held before the transfer, and entitle him to enforce the debt for his own indemnification. The same principle was applied in *Elkinton v. Newman*, 8 Harris, 281; and held to invest the assignor of a ground rent, with a right to bring debt, or covenant in the name of the assignee, on the deed by which the rent was reserved, for the purpose of recovering the arrears of the rent, which he had been compelled to pay, under a guaranty given at the time of the assignment.

[*92]

*PURCHASES BY TRUSTEES.

FOX *v.* MACKRETH.PITT *v.* MACKRETH.

MAY 12, AND NOV. 10, 12, 13, 23, 24, 26, 1787, AND DEC. 7, 8, 11, 1788, LINC. INN HALL.

THE CASE AND ARGUMENTS ARE TAKEN FROM 2 BRO. C. C. 400. THE JUDGMENT FROM 2 COX, 320.¹

PURCHASE BY A TRUSTEE FOR SALE.]—*A trustee for the sale of estates for payment of debts, who purchased them himself, by taking an undue advantage of the confidence reposed in him by the plaintiff, and previous to the completion of the contract sold them at a highly advanced price, decreed to be a trustee, as to the sums produced by the second sale, for the original vendor.*

THIS cause came on by appeal from the Rolls.

The original bill was filed in June, 1781, by the plaintiff, James Fox, Esq., against Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs. The supplemental bill was by William Morton Pitt, Esq., and James Farrer, trustees of the estate and effects of James Fox, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the

¹ S. C., 4 Bro. P. C., Toml. ed. 258. See Hargrave, Jur. Arg., 453, 526; Reg. Lib. 1788, A., fol. 64.

plaintiff's estates in the county of Surrey, made to Thomas Page, Esq., might be declared to have been made in trust for the plaintiff, and that Mackreth and Dawes might be declared to be accountable to the plaintiff for what the estates were sold for to Page, and also for accounts of what was due to the defendants Mackreth and Dawes, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain, respectively, out of the purchase-moneys of the estates, what should be found justly due to them from the plaintiff, *and an account of moneys due to the defendants, on account of an- [*93]nuities granted by the plaintiff to the defendants, the plaintiff offering that the defendants should be at liberty to retain the sum found due out of the said purchase-moneys.

The circumstances of the case made against the principal defendants, Mackreth and Dawes, as taken from the bill, answer, and evidence, appear to be these:—

That the plaintiff Fox, being seised in tail of an estate at Horseley and elsewhere, in the county of Surrey, subject to an estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had, before he came of age embarked in a very expensive course of life, and was reduced to great distress, and, under these circumstances, had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them; that his friends, being acquainted with his situation, proposed, that as soon as might be after he should attain his age of twenty-one years, he should suffer a recovery of the Surrey estate, which, or a competent part thereof, should be conveyed to trustees, to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; that he attained his age of twenty-one in the month of August, 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant Mackreth, (who usually supplied young men of fortune with money in their distresses,) and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till Michaelmas Term, it was agreed that the defendants, Mackreth and Dawes, should supply the plaintiff with the sum of 5100*l.*, upon the plaintiff's granting two annuities of 500*l.* and 350*l.* each for his life; that Dawes, on the 23rd of September, advanced the 5100*l.*, for which the following securities were executed:—A bond of that date by the plaintiff, in the penal sum of 6000*l.*, for securing to the *defendant Dawes an [*94] annuity of 500*l.*, for the life of the plaintiff; a warrant of attorney of even date to confess judgment on the said bond; and an indenture tripartite, between the plaintiff of the first part, Dawes of the second part, and Garforth of the third part, whereby lands in the county of York, of which the plaintiff was seised for life, were conveyed to Garforth, for securing the payment of the annuity of 500*l.* to Dawes. The annuity of 350*l.* was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon,

and a similar conveyance of the same lands to Garforth, for better securing the same. In the annuity of 500*l.*, Mackreth, in his answer, admitted he was interested with Dawes, but denied that he was so in that of 350*l.*

In Michaelmas Term, 1777, a recovery was suffered of the freehold part of the Surrey estates, by which they were vested (subject to the mother's estate for life in a part thereof) in Oliver Farrer, in trust to convey the same in such manner as the plaintiff should direct, Mr. Farrer having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with and under the direction of two of the plaintiff's friends (which appear to have been Lord Ligonier and Lord Grantley,) if they could be prevailed upon to accept the trust. In December, 1777, the plaintiff, being threatened with an arrest for the sum of 2000*l.* by the holder of bills of exchange drawn by the plaintiff while at Paris, applied to the defendant Mackreth, who agreed to lend the plaintiff 3000*l.*, on mortgage of the Surrey estates; upon which mortgage-deeds, dated 22nd and 23rd of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that the defendant Mackreth should be a trustee with Farrer for payment of the debts and redeeming the annuities, when the defendant Mackreth proposed the defendant Dawes for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could assist in purchasing them at a cheaper rate than Mr. Farrer; which was assented to by the plaintiff, upon an assurance [95] *that nothing should be done without Mr. Farrer being consulted and approving thereof.

In the same month the plaintiff delivered to the defendant Mackreth a particular or rental of the estate in Surrey, made by Thomas Jackman, by which it appeared that the rents of the houses and cottages on the premises amounted to 283*l.* 1*s.*, and those of the lands to 979*l.* 14*s.* (subject to the mother's jointure, which was stated at 240*l.* a year,) and the timber was valued in the rental at 4000*l.*, and the whole was valued 45,000*l.* It was also in evidence, that Mackreth sent down a man of the name of Hampton to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to Mackreth, did not appear.

A trust-deed was prepared by Garforth, reciting the mortgage, by which the estates were conveyed to Mackreth and Dawes (subject to Mackreth's mortgage and the annuity to Dawes,) in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. Farrer, he made some objections thereto, on account of the sums advanced, as the prices of the annuities, not being scheduled as gross sums carrying interest at 5*l.* per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth should pay off Dawes, and advance some further sums, a deed poll was prepared, calculated for execution on the 16th January, 1778, and indorsed on the mortgage-deed, to secure such further sum of 7000*l.*, consisting of 5100*l.*, the consideration money for the annuities granted by the plaintiff to Dawes, with 212*l.* 10*s.*

interest thereon, for the quarter's arrear due 23rd December, 1777, (but which was not paid by Mackreth to Dawes until the 16th July, 1788,) and 51*l.* 14*s.* 9½*d.*, twenty-three days' arrear of the said annuities, from 23rd December to said 16th January, and 1635*l.* 15*s.* 2½*d.* paid to the plaintiff on that 16th January, 1778. A new trust-deed was also prepared, in which this deed poll was recited, *and the 3000*l.* and 7000*l.* made the first charges on the estate. [*96]

On the 16th January, 1778, the plaintiff Fox and the defendant Mackreth dined together at the house of the defendant Garforth, for the purpose of executing these deeds, and after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant Mackreth should become the purchaser of the estate, and Jackman's valuation of 45,000*l.* was mentioned by the plaintiff as a fair price, which was objected to by Mackreth, considering the value put thereby upon the houses and lands: upon which the defendant made a calculation of the houses at fourteen years' purchase, and the lands at thirty, together with the household furniture, valued at 500*l.*, and the timber at 4000*l.* (on which last two articles they agreed,) amounting to 37,853*l.* 14*s.* The plaintiff afterwards offered to sell the estates to the defendant for 42,000*l.*, upon which the defendant said he would split the difference, and give 39,500*l.* for the same, but would not give more; and the plaintiff not agreeing to accept the terms, the trust-deeds were then executed by the plaintiff.

After the deeds were executed, the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept the defendant's terms, the defendant offered the 39,500*l.*, and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him; upon which the parties agreed, and the defendant Garforth (who had been absent during the greatest part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before the 25th of March next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the defendant Mackreth; and about twelve o'clock at night this memorandum was signed by the plaintiff, upon which the trust-deed was cancelled.

On the 28th of the same month, articles for the purchase were executed by both parties. On the 24th April following, *the plaintiff, and Anna Fox his mother, on the 2nd of May, executed conveyances of the estate to the defendant, in consideration of 39,500*l.*, 11,097*l.* of which was retained by the defendant, in payment of the above mortgage of 3000*l.*, the 7000*l.* secured by the deed poll, and some other sums charged by the defendant, as advanced to the plaintiff; and the defendant gave the plaintiff, as a security for the residue, (being 28,403*l.*,) a common accountable receipt; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote, on the same piece of paper which contained the said accountable receipt, the following charge:—"25th April, 1773. I do hereby charge all my estates in the county of Surrey with the payment of the above sum of 28,403*l.*, and interest." At the time of signing the above, the defendant had no estates in the county of Surrey but those purchased by

him of the plaintiff; and the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge.

In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with Thos. Page, Esq., for the sale of the whole of the said estate; and on the 21st March, Mr. Page agreed to give 50,500*l.*, for the same, but no article was entered into between him and the defendant till the 30th of April following. Immediately after, Page was let into possession, and was to receive the rents and profits from Lady-day then last. The treaty with Page was totally unknown to the plaintiff, when he executed the conveyance to the defendant.

The plaintiff drew upon the defendant for several sums on account of the purchase-money; and in October, 1778, having sent for an account, the defendant drew one out, by which he made a balance remaining in his hands of 773*l.* 18*s.* 9*d.*; but admitted in his answer that he had therein charged moneys unpaid, as the supposed amount of two annuities and the arrears thereof then unredeemed; and afterwards, in May, 1779, having then settled the said annuities, he sent the plaintiff another account, in which [*98] he made the balance 616*l.* 17*s.* above the other balance of *773*l.* 18*s.* 9*d.* In June, 1779, the plaintiff, being again in distress, applied to the defendant, when he advanced him 2100*l.* upon an annuity of 350*l.* a year for plaintiff's life, secured by a bond in the penal sum of 4200*l.*, and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to Page, under the circumstances as stated above, the plaintiff filed his bill,¹ insisting that the defendant Mackreth, being a trustee for him under the trust-deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff; and if he purchased for himself (which the plaintiff was advised he could not) it should be for a fair and adequate consideration; that the plaintiff, having been imposed upon, ought to have the benefit of the sale; and that the sum of 7000*l.*, mentioned in the articles as due to Mackreth, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to Dawes, was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase-money than the sums really advanced, with interest from the time of advancing the same; that Mackreth had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of 350*l.*, there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his hands the sums for which he sold the plaintiff's estate, beyond the sum of 39,500*l.*, and therefore prayed as is before stated.

The defendant Mackreth, by his answer, insisted on the fairness of the transaction, and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels; but that the purchaser, Mr. Page, having an estate in the neighborhood,

¹ In 1781.

gave a larger price than it was worth to other persons. He admitted that he had in his hands a balance of 617*l.* 13*s.* of the purchase-money, which he claimed to retain, on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the *defendant, and 773*l.* 18*s.* 9*d.*, the balance of the accounts sent to the plaintiff in October, 1778; [*99] and the defendant Mackreth further said, that on the 30th of August, 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney; and that Mr. Page, the purchaser, in November, 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of the 22nd and 23rd December, 1777, and the conveyance from the plaintiff to the defendant or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant (but it was in evidence that Mr. Farrer only consented to the plaintiff's executing the same under a proviso that the same should not be considered as a confirmation,) which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

The cause was heard at the Rolls, before his Honor Sir Lloyd Kenyon,¹ the then Master of the Rolls, on the 26th, 27th, and 29th of June, and on the [4th,] 13th, 14th, and 26th of July, 1786, on which last day his Honor was pleased to make his decree, whereby he declared that undue advantage was taken by the defendant Mackreth of the confidence reposed in him by the plaintiff Fox, and that therefore the defendant Mackreth ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23rd and 24th days of April, 1778, for the said plaintiff Fox, after the execution of the said deeds; and ordered it to be referred to the Master to take an account of the money received by the defendant Mackreth from Page, and to compute interest thereon, at 5*l.* per cent., from the time of receiving the *same, and to take an account of the money paid by the defendant Mackreth to Dawes on account of the annuities of 500*l.* and [*100] 300*l.*; and also an account of the money advanced by Mackreth on account of the annuity of 350*l.* in 1779;² and an account of money received by Mackreth on account of the mortgage in 1778, and under the contract for the purchase of the estate,³ and compute interest on the same; and that the defendant Mackreth should pay the plaintiff the costs of the suit in respect of his insist-

¹ Decree of Sir Lloyd Kenyon, M. R.

² "And the particular times when, and in what manner, such sums were advanced." Reg. Lib.

³ "Or the conveyance thereof, and to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively." Reg. Lib.

ing on the conveyance of the 23rd and 24th of April, 1778, as a conveyance for his own benefit: and granted an injunction against the defendant Mackreth, to restrain him from proceeding at law touching any matter in question in the cause;¹ and reserved further consideration.

From this decree there was an appeal, by the defendant Mackreth only, to the Lord Chancellor, which came on to be heard in Michaelmas Term, 1787.

Mr. Mansfield, Mr. Scott, Mr. Lloyd, and Mr. Mitford were heard for the respondents in support of his Honor's decree. His Honor declared, as the foundation of his decree, that an undue advantage had been taken of the confidence placed in Mackreth by Fox, and upon that ground directed the proper accounts to be taken. In that decree, Dawes and Garforth have acquiesced. Mackreth, the principal defendant, only disputes the justice of it; nor is it to be wondered at that he does so, for, whilst the decree stands in force, his character stands materially affected. The parties on the other side are anxious to maintain the decree, not merely on account of the largeness of the property, but as a useful precedent. (The counsel enumerated the facts of the case, as before stated.) Upon the facts as stated, his Honor thought Mackreth had abused the confidence reposed in him by Fox, and ought, with respect to the purchase, to be considered as a trustee for him, and that Fox ought to have the advantage of the transaction with Page. The circumstances are certainly such as to show an implicit confidence placed by Fox in Mackreth and Garforth, who appears to have been attorney for Mackreth. Wherever the [*101] transaction would *bear the light, the deeds were sent to Farrer, the plaintiff's trustee; where it would not, it was kept a profound secret from him, although Mackreth had promised that nothing should be done without the latter being consulted. That Garforth was the agent of Mackreth, not of Fox, is apparent: he was privy to the whole transaction with Page. If he was the agent of Fox, he should have given him notice of that transaction; if he was not, the utmost confidence is given to Mackreth: Fox takes his word in everything; he gives up to his opinion Jackman's valuation and his own judgment; and at twelve o'clock at night sells him the estate at his own price, which was 10,000*l.* below Jackman's valuation. So with respect to the furniture: it is sold at Mackreth's valuation, though it included five hundred pounds' worth added by Fox himself to the furniture left by Lord Bingley. Mackreth through the transaction affected to be the friend of Fox, and by his conversation with Farrer, admitted himself to be a trustee for Fox; for that conversation cannot be explained by Mackreth's being to have the purchase-money to pay debts, as that agreement did not subsist at the time, the agreement at that time only being that the purchase-money should pay the debts charged on the estate. Enough has been stated to show that Fox was in the situation to be the object of fraud, that a trust was reposed in Mackreth, and that fraud has been practised upon him; and, therefore, sufficient to maintain the declaration in the decree. But it has been, and will be again, endeavoured to protect Mackreth, by arguing that the case does not fall under any of the

¹ This injunction was dissolved by Lord Thurlow, but, as he afterwards confessed, by mistake, see *Ex parte Lacey*, 6 Ves. 627.

heads of fraud. To this it has been answered by his Honor, that it was such a transaction as could not be maintained, but that it did fall within the cases of young men, having estates in possession and in reversion, and dealing with a man of business, and of advantage taken of their distress, except that this case had the pre-eminence, as being the case where confidence had been so much abused. It was also argued, that inadequacy of price was not a ground for setting aside the bargain, though it has been frequently decided, that, *where the inadequacy is very great, that has been a ground for re-[*102] scinding the transaction: *Chesterfield v. Janssen*, 1 Atk. 301; 2 Ves. 125. The real value of the estate here was 50,500*l.* and it is sold for 39,500*l.*; the inadequacy, therefore, proves the abuse of confidence; and, though it is undoubtedly true that every contract improperly made shall not be rescinded, yet a contract grossly inadequate and founded in breach of confidence, will surely be set aside; though the Court cannot affect the strict rule of morality, and can only enforce what Mr. Maddocks called a technical morality, yet, in the case of a trustee or a person standing in a situation of which he can avail himself, the Court will not suffer him to derive advantage from that circumstance. Here every art was used to impress Fox with the idea that Mackreth and Garforth were his friends, though the transactions with respect to the annuities show them very much otherwise. Mackreth certainly derived an advantage from his situation: Fox never was out of his debt. To deal with him at all was a fraud on the part of Mackreth: *Osmond v. Fitzroy*, 3 P. Wms. 129. There was nothing like the confidence, or the abuse of the confidence, in *Gwynne v. Heaton*, 1 Bro. C. C. 1, that there is in the present case; yet there the transaction was set aside. Here the confidence reposed in Mackreth is made use of to induce a confidence in Garforth. The same person being employed on both sides, has been considered, in the case of Sir *P. Jennings Clerke v. Smith*, at the Rolls lately, as a sufficient badge of fraud to set aside a transaction. There, Sir Philip had bought an annuity of Smith; the same person was concerned as attorney on both sides, and had not taken proper care of the security: his Honor thought that a sufficient ground on which to direct an inquiry. Then, with respect to the confirmations, none of the facts come within the cases which have been held to be confirmations; in order to be such, they must amount to a release of action. The reason given in *Chesterfield v. Janssen*, for holding it a confirmation was, that Spencer knew all the transaction, and that he was entitled to set it aside. In the present case, the suffering the duplicates to be made of the deed is a *mark of [*103] confidence, but by no means amounts to confirmation, as it was done without any knowledge in Fox that he could impeach the transaction. *Baugh v. Price*, 1 Wils. Exch. 320, was a case where all the acts were repeated, yet held no confirmation: *Taylor v. Rochford*, 2 Bro. P. C. 281. No act can be a confirmation of a preceding contract but what is done with full knowledge of that contract: *Cole v. Gibson*, 1 Ves. 503.

Mr. Ambler, Mr. Maddocks, Mr. Selwyn,¹ Mr. Ainge, and Mr. Hargrave,

¹ Mr. Selwyn read, as part of his speech, a note of what the Lord Chancellor (Thur-

for the defendant and appellant Mackreth.—The Master of the Rolls has decreed 11,000*l.* to be paid by Mackreth to Fox. We shall submit to the Court, that his Honor has gone, in making the decree, further than, from any of the cases, or from the reason of the thing, he ought to have done. It will be necessary, in order to show this, to state the progress of the cause. The first bill was filed in the name of Fox, in June, 1781, three years after the purchase by Mackreth; another bill was filed in February, 1782. In March, a motion was made for an injunction to restrain Mackreth from proceeding on the annuity bond. Mackreth's answer was read against that application; and your Lordship was of opinion, that there should be no injunction, there being no surprise upon Fox, nor any fraud imputable to Mackreth. Then, for the purpose of introducing creditors into the cause, in May, 1782, an assignment is made by Fox of his estates to four trustees, Mr. Pitt, Mr.

[*104] Hoare, Mr. *Oliver, and Mr. James Farrer, in trust, to pay debts. In 1784, Mr. O. Farrar releases himself, and in June in the same year a bill is filed by the three trustees, to have the benefit of the suit begun by Fox: this artifice was used in order to have the advantage of the plaintiffs appearing as creditors. The cause came on to be heard in the same manner as if brought by Fox. The decree is wrong, both in the declaration and in the direction. We contend, first, that there was no confidence reposed by Fox in Mackreth; secondly, whether there was a confidence reposed or not, there was no abuse of it; thirdly, that neither the declaration, facts, nor circumstances support the directions. With respect to the first head, there is no circumstance by which a confidence can be shown to have been reposed in Mackreth. He was only a trustee as to the 28,403*l.* balance, to apply it

low) said on discharging the order for the injunction, to the following purpose: * *Lord Chancellor*.—It is impossible to observe, that one-fifth more has been paid for the estate, and not to wish that the first owner should have the advantage. I have tried, on the head of every one observation, whether I could decree that Mackreth should be a trustee for Fox, for the difference of value in the estate. I attended, with great care, to see whether I could find any surprise on Mr. Fox, but the whole case begins and ends with the circumstance of an advantage being made in point of price. If Mackreth had sold the estate to A. (being a trustee for Mackreth), the case could not have stood; but Mackreth lost the character of a trustee when he became a purchaser of the estate. The rental was extended into particulars, for the purpose of calculating the true value of the estate. It is not argued, that the rental was unfair. Jackman's calculation was pressed by Fox upon Mackreth; deliberation was had, and the difference split between them. A slight memorandum was made by Mr. Garforth, who acted as agent for Fox; and his memorandum was laid before Mr. Burton, at the bar. It is not on the 28th of January that the agreement is signed by Fox; but it is a deliberate act by Fox at the distance of twenty-two days. The whole impeachment of the transaction, which is now opened, is upon the difference of price.† It does not appear to me, that, at the time of the purchase, a greater price could have been produced in the common course of business of sale of estates.

* This injunction was dissolved upon a clear mistake: *Ex parte Lacey*, 6 Ves. 627; vide note, post.

† The price given for the estate, according to the principle upon which the case was ultimately decided, was immaterial.

in the payment of debts, for which sum he has accounted; certainly every trust implies a confidence; but not such a confidence as is meant in the decree, as a trust to be abused. If the trustee does not perform his trust, it is a breach of trust, not an undue advantage of his situation. Where a person treats with another without the power of inquiring into the value, and makes an improper bargain, that is taking an undue advantage; but that is not the case of a trust. The declaration is, that Mackreth has taken an undue advantage of his situation; and, therefore, is to be considered as a trustee for the plaintiff: this could refer only to the purchase, not to the loan or the annuity, and these cannot be said to be transactions of confidence farther, can the purchase be so considered? Two persons are dealing for an estate. Mr. Fox wants an extravagant price; Mr. Mackreth wants to purchase at a reasonable one: both argued as to the value. Fox had a valuation as well as Mackreth, and a fair price was given. If so, the declaration cannot be right. Secondly, the bill is filed to attack every transaction between the parties, and to make the whole appear as one system of fraud, yet if they can succeed in the point of the purchase, it is all they want; the other circumstances are thrown in to give weight to the main point, that Mackreth shall account for 11,000*l.* received from Page; that is, for 5500*l.* [*105] more than Jackman's valuation. The true question is, whether Mackreth is a fair purchaser of the estate at 39,500*l.*? There is no pretence that he ever refused to let the annuities be redeemed—two of them, in fact, were redeemed; nor is there any ground to quarrel with the loan. Mackreth had no dealings with Mr. Fox during his minority; he did not even know him at that time. The first application to Mackreth was from Garforth, to buy an annuity. Garforth was connected with Fox for the purpose of borrowing money. If none of the articles themselves are sufficient to impeach Mackreth, being taken together, they will not do so. As to the annuities, Fox sought Mackreth. In December, 1777, he granted him two annuities, amounting to 800*l.* a year; part of the 500*l.* a year annuity was the property of Mackreth, but the annuity was taken in the name of Dawes, and was at six years' purchase. Fox had been of age a month before Mackreth knew of his intention to suffer a recovery in the ensuing Michaelmas Term. It is said, Mackreth, knowing this, should not have entered into this contract; but there is no reason why he should not. Fox had at that time only a life estate, and could make no security but a grant of an annuity. Six years' purchase was then allowed of as the common price. In a case of *Floyer v. Sherrard*,¹ before Lord Hardwicke, Hil., 1740, Floyer had bought of Sherrard an annuity at six years' purchase, secured upon money in the funds, in the names of trustees. He filed his bill against the trustees to pay the annuity: the objection was, that Sherrard was a man in distress, and that only six years' purchase was given for the annuity. Lord Hardwicke said, this case differed from that of young heirs, because Sir B. Sherrard, the father, was in possession of the estate. A sale of an annuity, not redeemable, was not an usurious trans-

¹ Amb. 18.

action; where they are made redeemable, the Court has thought it an evasion of the law. As to the price of an annuity, it is the most uncertain thing in the world; taking it upon the highest calculation, it is only one year's [*106] *purchase under the value; and the Court will not set it aside on that account. Then as to the security; if he had taken it on the estate, it would have been good. It was done on bond and judgment, without insurance of the life. Every hardship which occurs in this case is such as must occur in every case of the kind. Then this annuity was not redeemable. Lord Hardwicke's opinion on this subject appears to have been, that a redeemable annuity is usurious.¹

[*Lord Chancellor*.—I do not believe that has ever been decided. It is certainly a ground to suspect a shift; but there is no decided case, that the annuity being redeemable will make the transaction usurious.²]

With respect to consulting Farrer, that was not Mackreth's business, if Fox did not choose so to do. If it was anybody's business to advise Fox, it was rather Farrer's than Mackreth's. The next transaction is, the recovery suffered in Michaelmas, 1777; the legal estate was by it vested in Farrer, to protect it against the annuitants and creditors. He was mistaken with respect to this matter, for a judgment creditor could have taken out execution against the estate of the cestui que trust, the same as if it was a legal estate. As to the application for the loan of, first 2000*l.*, then 3000*l.*, what ground is there to quarrel with that? In that transaction Farrer was consulted; he was present at the execution of the mortgage deed, and proves the payment of the money. Two objections are made to it; first, that Mackreth took the legal estate out of Farrer; but Farrer thought it right that Mackreth should have the legal estate. Secondly, the other objection is, that it was part of the system, and having the legal estate would assist them in carrying it into execution; but, if it was wrong, Farrer ought not to have parted with the legal estate: no objection was made to Mackreth's being mortgagee in fee. Again, it is objected, that Mackreth did not then turn the annuity into a debt; but Fox wanted the 3000*l.* immediately, and it might not occur to Mackreth to turn the annuity into a debt. The next matter is, the transaction with res- [*107] pect to the trust. *Mackreth did not propose himself; this was proved by Farrer, who says it was proposed either by himself or Fox. Mackreth says, in his answer, that he did not propose himself; Farrer declined being a trustee; and then Mackreth proposed Dawes, as being acquainted with annuity business. Farrer approved of Dawes, and Garforth took his instructions from Farrer. A copy of the particulars was delivered to Mackreth. On the 6th of January, 1778, the draft of the conveyance was sent to Farrer, who returned it on the 7th, with this observation; that it was not as he expected; for the annuities were carried down to the time of the sale, whereas they were to be turned into loans; and that Mackreth and Dawes

¹ See *Floyer v. Sherrard*, Amb. 19.

² It is now fully established that such a transaction is legal. See *Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219, Amb. 244, note (3), Blunt's edition.

were to have the whole authority to sell without any consent of Fox. There had only been a conversation, in which it had been proposed to turn the annuities into a loan. Then as to the sale itself. On the 16th of January, Fox and Mackreth treat on the subject. Mackreth offered 37,000*l.*, at last 39,500*l.*, including the furniture, and securing Mrs. Fox's (the mother's) jointure. This agreement was put into writing by Garforth: no objection is made to the form of the writing. On the 28th of January, the contract was signed by Fox and Mackreth. The conveyance was laid before Farrer, and executed on the 24th of April; so that it was incomplete from January to April. The objection now taken and relied upon is, that Mackreth was a trustee, and, therefore, could not contract for the purchase of the estate: but we deny that he was a trustee; and, even though he were so, he might purchase upon fair terms. They contend, on the other side, that the trust deed was executed, and Mackreth bound not to contract with his cestui que trust. It is true, it was executed by Fox: for, during the conversation about the purchase, Fox, not agreeing to sell at the price then offered by Mackreth, executed the trust deed, but continued the conversation relative to the purchase, the trust deed lying all the while upon the table. If the conversation had ceased, the deed would have had effect; as it was, it was a nullity. Then how can it operate as a trust? *It was a trust intended, if they will— [*108] commenced, but at the same moment put an end to—never acted under, but broke off immediately. But, even supposing him to be a trustee, he might contract for the estate, so that he did but deal fairly. We admit that a trustee cannot purchase for his own benefit. If, as a trustee, he had conveyed to a third person as a trustee for himself, that would be void; but there is no case which has decided that the cestui que trust cannot sell to his trustee. On the contrary, it was done in the case of *Clarke v. Swaile*,¹ before Lord Northington, where Sir Samuel Clarke, by the advice of Swaile, conveyed the estate in question to him to sell for payment of debts. Swaile endeavored to sell the estate but could not meet with a purchaser. Swaile afterwards treated for and purchased the estate, which was conveyed to him at a fair price, and the money was applied in payment of Sir Samuel Clarke's debts. Another deed was afterwards executed on account of a variance in the description of the estate, and a third, occasioned by a variance of the boundaries. This last was executed by Sir Samuel Clarke and Robert, his brother. Sir Samuel died, and Robert (now Sir Robert) filed his bill, on the ground of a confidence being placed by Sir Samuel in Swaile as his attorney, and that his circumstances were such that he durst not quarrel with him. Lord Northington said, as to the cestui que trust dealing with the trustee, he did not much like it; but, upon the whole, he did not see any principle on which he could set the transaction aside. In the present case there is no species of fraud; it is not even attempted to be stated in the bill; but they argue, that, from the case itself, there is an implied fraud: the parties met for a very different purpose; there is no color to say it was to draw Fox into a

¹ 2 Eden, 134. See also *Coles v. Trecothick*, 9 Ves. 234; *Morse v. Royal*, 12 Ves. 355.

sale at an under-value. In *Floyer v. Sherrard*, Lord Hardwicke relied on there being no proposal coming from Floyer. Then as to the argument, that Fox was in distress: he was upon the eve of extricating himself from any distress he might have been in; he was of age; and there is nothing to prove [*109] any weakness of mind, or *incapacity of any kind. He was perfectly competent to act. He asked 45,000*l.*, and for that purpose produced Jackman's valuation. Mackreth objected that it was thirty-five years' purchase for houses and land, which was a monstrous price, and offered fourteen years' purchase for the cottages and thirty for the land, amounting to 37,000*l.* He afterwards advanced to 39,500*l.* Fox then insisted on 42,000*l.* Fox had a particular. It is said Mackreth had a valuation; but not a word of that is in proof. Farrer not being present at the final agreement, is the next head of objection. But if Mr. Fox did not choose to have him present, it could not be incumbent on Mackreth to send for him: besides, the draft of the conveyance was sent to him: and if the price was not adequate to the value, or there was anything wrong in the contract, Farrer should have objected to it, and have advised Fox not to proceed; on the contrary, it appears by his letter of the 7th of April, 1788, that he approved of the conveyance, except that he objected, in some respects, to the mode, and to the money remaining in the hands of Mackreth for payment of Fox's debts; but to the purchase itself Farrer never objected. With respect to the money remaining in Mackreth's hands, that does not go to the merits of the case, though the gentlemen on the other side have treated it as a badge of fraud. Mackreth accounted for the application of every shilling of the money, with interest for the time it remained in his hands. We have no objection to an account being decreed with respect to the application of the money. Then with respect to the confirmations, they are very strong. We do not dispute the principle, that whilst the distress continues subsequent acts shall not be held to be confirmations. It appearing upon the sale to Page, that part of the estate which had been sold as freehold really was copyhold, Fox, on the 19th of August, 1779, executed a warrant of attorney to surrender the same. This was not clandestinely, but openly applied for; it was a conveyance of a part of the estate which was not conveyed before. He afterwards executed duplicates of the deeds. The [*110] *purchasers from Page in parcels wishing to have original deeds, Farrer made no objection, if they would indorse upon the deeds that they were duplicates.

[*Lord Chancellor.*—He expressly stipulated that the execution of these deeds should not be a confirmation.]

The real cause of the suit is, that Mr. Page has given 50,500*l.* for the estate. Mr. Fox rested under the sale till 1781, when that sale was discovered; but an advanced price being afterwards obtained is no reason for setting aside a previous fair sale of lands. To assert that it is, would be too much, where there is no fraud. The price of 50,500*l.* paid by Page was, in fact, a pretium affectionis; it was 5500*l.* more than Jackman had valued it at, or Fox ever thought of getting for it. Having shown, then, that Mackreth was no trustee, and that the separate acts are fair, there can be no fraud in them taken col-

lectively; yet the argument, *juncta juvant*, is relied on in this case. There is only one case in which that argument has prevailed; indeed, it is only fit to have a popular effect, not to be used in a court of justice. It only applies to a case made use of in circumstances which all terminate in one point, and which cannot be accounted for any other way. It is said, the circumstances in this case are all linked in one chain—that they all tended to the making an unreasonable purchase; but the other side have not been able to connect them. The treaty for the annuities and the purchase are separate and unconnected; therefore it is to be hoped that the argument used, viz. that, although the separate articles were not sufficient to set aside the transaction, yet that altogether they are sufficient, will meet the same fate here that it did in Parliament in the case alluded to,¹ and that this Court will reverse the attainder and restore Mr. Mackreth in blood.

Mr. *Mansfield*, in reply.—It is not to be denied that the large price at which the estate has been sold to Mr. Page is the cause of the present suit. It is that advance of price which affords the strongest evidence of the purchase by Mackreth being fraudulent. Mackreth and Garforth are to many intents one and the same. The *decree against Mackreth is, that he shall deliver [*111] up all papers which are in his hands. The present case contains fewer contested facts than generally occur in similar matters; and the remedy which lies with the Court is a very evident one. It has been argued that the Court cannot enforce an absolute, but only a technical morality. I know of no such term as “technical morality,” that has ever been applied in this or any other case; but where one person has obtained an unfair advantage over another, the province of a Court of equity is to give the latter redress. Lord Coke, in his First Institute, has very shortly defined the office of this Court to extend to cases of “covin, accident, and all deceit for which there is no remedy in a court of law.” What, then, is the true question in the present case? The Master of the Rolls has founded his decree in a confidence reposed by Fox in Mackreth. The question is only as to the inference to be drawn from the facts. In order to make out the confidence reposed by Fox in Mackreth, a few circumstances are to be attended to. Mr. Fox came of age in August, 1777. Very soon after that (in September, 1777,) the connexion between him and Mackreth began. The first step was the purchase of two annuities, at six years’ purchase; then the loan of 3000*l.* on mortgage of the Surrey estate; then Mackreth engages to become a trustee to sell the estate for payment of debts, apparently with no other intention than to relieve Fox’s necessities. On the 16th of January they met to execute the trust deed; but the meeting terminated in the agreement for the sale of the estate. On the 24th of April there is a conveyance of the estate, and Fox has nothing to show for the balance of 28,403*l.* but Mackreth’s accountable receipt and charge of the money on the Surrey estate. On the 21st of March, Mackreth had sold the estate to Page for 50,500*l.* Towards the close of 1778 he had lent Fox 1000*l.*; in June, 1779, there was a treaty for an annuity, part of the consideration for which

¹ The case alluded to is that of Lord Strafford.

was to be the 1000%. The account made up in 1778 is agreed on all hands to be a false one. In June, 1779, another account was made up. Then Mackreth [*112] applied for duplicates of the conveyances, which Fox complied with. These are the material facts, from which it is impossible to doubt that the fullest confidence was reposed by Fox in Mackreth, and that Mackreth did, on the 16th of January, take an undue advantage of that confidence. Every transaction of that day shows that Mackreth represented himself as Fox's friend. The account given by Mackreth, in his answer, relative to the loan of 3000% and the annuity, is contradicted by the evidence. A full confidence is not to be expected to an answer in general, which is proved false in any particular. Suppose it to be true that the proposal for the sale came on the 16th of January from Fox, how easy was it for Mackreth to suggest that an immediate sale would be better than entering into a trust deed, and to make the formal proposal come from Fox, though the suggestion was his own? But be this as it may, no just inference is to be drawn from it to the merits of the cause. Fox entered into the contract with Jackman's valuation in his hand, and at twelve o'clock at night drops his price to 39,500%. How is this to be accounted for but by his confidence in Mackreth? If the sale had been fair and open, I should be precluded from these observations; but there never was a contract which was more suspicious, from the characters of the parties concerned. The counsel on the other side have said, that, when they were treating for the sale, the confidence was over, and that they were in a market; but it is impossible a sale could be negotiated under circumstances more private. It is as near the case of a trustee selling to himself as can possibly be; but still it shows what opinion Fox had of Mackreth. It is highly probable that the latter had the sale in his contemplation when he made the appointment. This is rendered probable by his having a valuation. This observation has received no answer, except that it was natural, that, in order to sell as a trustee, he should have a valuation; but no notice was given to Fox of that valuation by Hampton. Fox and his agents [*113] were kept in the dark as to that survey. Mr. Fox came to *Garforth's to meet Mackreth as a friend, where Mackreth, having in his possession a valuation, and concealing that fact, induced Fox to sell for 5500% less than the only valuation he had. If there was nothing more in the case, Mackreth ought not to retain the great advantage he has made. As a friend, Mackreth should have let Fox know he had sold the estate to him for 11,000% less than he (Mackreth) had contracted to sell it for to Page. Then Fox parts with the estate on a bare accountable receipt and a charge upon the estate. The money is not deposited in the hands of any banker, and the estate is conveyed to Page without any notice of the charge, which made an end of the charge. This plainly shows that Fox trusted entirely to Mackreth. The settlement of the account is another mark of the most implicit confidence, and the whole transaction as to the loan and the annuity proves the same; but the gentlemen on the other side say, that the accumulation of the facts is immaterial, and that the application of *juncta juvant* ought to have no weight. If it was proved that the transaction of the 16th of January was

perfectly fair, I allow their argument would apply ; but whilst the great question of evidence is with respect to the fairness of the transaction of the 16th of January, it is material to show the complexion of the whole transaction taken together, and especially the power Mackreth had over Fox. This has the more weight, because it is incumbent on Mackreth to prove that the transaction of the 16th of January was fair and honest. To whom is it to be imputed but to him, that there was no witness of the transaction ? He ought not to have entered into such a treaty with a young man, without having a witness present. The whole transaction speaks the truth of the Master of the Rolls' declaration, that there was a confidence reposed in Mackreth ; and it will need very little argument to prove that that confidence was abused. Either Mackreth had a valuation at the time of the treaty, or not. If he had not, he induced Fox to sell at 5500*l.* less than his own valuation ; if he had, he concealed that circumstance from Fox, and now *conceals it from the Court. Another thing that is urged is, that Fox has confirmed the [*114] transaction. If he has confirmed it, I admit it cannot be rescinded ; but the first preliminary to a confirmation is, that the party should be previously apprized what it is he confirms. When the present comes to be compared with the confirmations in the cases where they have been held to bind, it is very unlike them ; for none of them, except the execution of the duplicates of the conveyances, have the least tendency to confirm. They are mere consequential acts. In *Chesterfield v. Janssen*, and *Cole v. Gibson* there were clear acts of confirmation. Here they are only carrying the contracts into execution ; and the execution of the duplicates only shows how much Fox was in the power of Mackreth. It was only done for the purpose of getting something which might be called an act of confirmation ; and Farrer refused to consent to their execution but with the proviso that it should not be considered as a confirmation. If Mackreth had first informed Fox of the real value of the estate, and then he had affirmed the contract, it would have been final. On the contrary, he was in distress in 1779, and absolutely in the hands and power of Mackreth ; and so he was at every period when the confirmations were obtained. No one act was done with a knowledge of the value of the estate. By his own admission, Mackreth cheated Fox out of 600*l.* or 700*l.* in his first account. In May, 1781, he sent him another account, rectifying the mistake. In the meanwhile he had lent him money on bond, and bought an annuity of him. If not from friendship, from what principle did Mackreth act, but from the desire to get this estate, or as much as he could out of Fox ? It is urged, that this transaction cannot be set aside, because, if it is, no man can purchase at a fair price and sell at a greater without the fear of having the transaction rescinded. But was there ever a fair case where such an advantage was taken as in the present ? No man, acting fairly, would deal with a young man without witnesses ; no man, acting fairly, would conceal his having a valuation. It is to be hoped such a transaction will *never exist [*115] again ; but no fear can arise to fair transactions from such a transaction as this being overturned.

LORD CHANCELLOR THURLOW.¹—The great and only doubt which I have had from the beginning to the end of this case is, whether the ground upon which I must go, if I affirm this decree, will not by necessary implication extend to many other cases, in which I shall run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure. I do not argue with those who say, that, wherever such an advantage has been taken in the course of a contract by one party over another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case:—Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a Court of equity set aside this bargain? No: but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but *because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge*; for, if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is therefore not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information, *but it is also necessary to show some obligation binding the party to make such a disclosure*. Therefore, the question is, not whether this transaction be such as a man of honor would disclaim and disdain, but it must fall within some settled definition of wrong recognized by this Court; for, otherwise, the general transactions of mankind would be too much in hazard and uncertainty. In this view, and in this view only, I have entertained considerable doubts on this case.

[*116] *The Master of the Rolls has referred a great variety of accounts, subsisting between the parties, to the Master; and it is not quite a fair argument to consider this part of the case as altogether decided. If these points are material, the only consequence is, that, as to them, the judgment must be suspended.

In the present appeal I shall consider the case entirely on the transaction of the 16th of January. I shall also consider certain terms necessary to be found, in analogy to the finding of a jury. First, it is necessary to find the real value to be what Page gave for the estate, or much more at least than the price given by Mackreth; for, unless there be great inadequacy of value, the case comes to nothing. The fraud or imposition of the one party affords no ground of relief, unless *damage* be sustained by the other;² and, on the other hand, it does not follow, though the real value should be found such as now represented on the part of the plaintiff, that it will put an end to the contract, unless such advantage has been obtained by some of those frauds which the policy of this Court has adopted as grounds on which to set contracts aside.

The Master of the Rolls has said that Mackreth shall be a trustee, and so

¹ 2 Cox, 320.

² This opinion Lord Thurlow changed, for he refused an inquiry as to the value of the estate.

he must be taken *consequentially*; for, if it be true that Mackreth has cheated Fox in this bargain, he did get the estate at law, but he did not get the estate in equity, and then he is reduced to a trustee. It is *only* in consequence of his getting the estate by fraud, that he becomes a trustee. Suppose an estate to be of the value of 50,000*l.*, and Mackreth buys it for 40,000*l.*, committing great fraud in such purchase, but, from the calamities of war and other public distresses, landed property as well as stocks sink in value more than one-fifth, and Mackreth then sells the estate for 35,000*l.* or 30,000*l.* only, would it not be true that Mackreth would be bound to pay the 10,000*l.* as a satisfaction for the fraud committed by him, although he had not made the money he actually gave for it? The money would be due, not in consequence of what Mackreth afterwards sold it for, but **what* Fox lost by it at the time. The only consequence, in a Court of equity, is, that what one party lost by [*117] the undue advantage taken by the other must be answered to him.

The Master of the Rolls went on the fact of the value of the estate being that for which it was sold to Page, and thought, that, this being the value, Mackreth had cheated Fox. Taking this for the present to be so, let us go over shortly the facts of the case.

Fox, began to be distressed about three or four years before he came of age. He engaged other young men, with whom he was connected, to become securities for him for sums of money he had borrowed. He had involved himself in annuities. When he came of age he found himself under this imperfect obligation in point of law, but very strong obligation in point of honor, to relieve those who had pledged their names for him. A plan was formed to sell a part of his estate. His situation as to fortune when he came of age was this: his estate in Surrey was about 1200*l.* per annum. Of this he was tenant in tail. He had an estate in Yorkshire of 1100*l.* per annum, of which he was tenant for life. He had also an estate in Ireland, of which he was tenant for life in possession, of about 5000*l.* or 6000*l.* per annum. Such was his situation when he came of age. He had resorted to a man of character in his profession, Mr. Farrer, for the purpose of settling this business. The 23rd of August, 1777, came, and no step was taken towards taking any account of his debts and annuities, or negotiating with any of his creditors; yet it is most evident that the best time for settling these matters with his creditors was before he came of age.

However, he came of age on the 23rd of August; and on the 23rd of September, it seems, the first conversation was had upon this subject. He had then been introduced to Mackreth. At that time, certainly, there was nothing confidential in their intercourse, or any close connexion between them; but Fox applied to Mackreth for about 5000*l.* Mackreth naturally asked what security he had to offer. Fox thereupon told him his real situation, by which **it* appeared that Fox had no permanent security to offer till Michael- [*118] mas Term, when he could suffer a recovery of the Surrey estate. Mackreth then proposed to him, as the ordinary mode of raising money, to buy an annuity of him at six years' purchase, which is, in truth, about half the real value; and, therefore, whoever proposes to deal with another upon this sort of

terms, quits at once all idea of delicacy or generosity or propriety of conduct. It is such as cannot be endured out of a Court of justice; and, if a Court does affirm such transactions, it cannot be the heart of a judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure. There were other modes which might have occurred to a man of different feelings. A contract to make a mortgage when the Term came would have been an effective lien on the estate; and then it would only have been necessary to have insured Fox's life to the end of Michaelmas Term. This would have been the just and honorable way of relieving him. On the other hand, it is observable, that, though Mackreth adopted the other mode of raising the money, it was done in the usual course of his business; for, by profession, he dealt in the distresses of mankind. What he did, he did in his way and business of an annuity-monger. I make neither better nor worse of his conduct than that of a common and professed annuity-monger.

In November the recovery was suffered. Still nothing was done by Fox's friends towards relieving him from the annuities, which were eating him up. On the 24th of December, Fox sends word that he was in great distress, in confinement, and wanted money immediately. Mackreth came to him and lent him money on common terms, and took a mortgage for it. A judge cannot impute anything to this part of the transaction, either one way another. There was no generosity on one side, nor any plot of circumvention on the other. It would be a most extravagant conjecture to suppose that by this [*119] Mackreth had in view to get the legal estate in *himself. When one once gets beyond the natural result of facts, there is no end to conjecture or its consequences. This was the situation on the 24th.

Mackreth was made acquainted with the plan of the trust deed, and it is certain that he industriously recommended himself and Dawes as trustees for this purpose. It has been said, that Mackreth's forcing himself into the trust was improper, and done for some bad motive; and that taking the business out of the hands of Mr. Farrer was calculated to give Fox a bad impression of him. I do not agree to this. In whose room were Mackreth and Dawes to be substituted? The two first were Lord Grantley and Lord Ligonier, who were put in only because they were lords, I believe; for it was not very probable that they should be active or attentive in executing such a trust as this. As to Mr. Farrer himself, it is only to be said that he had, in fact, done nothing in the affairs, nor taken any step towards it. I therefore really believe that Mackreth meant what he said upon that occasion; and, when he proposed himself and Dawes as trustees, he meant to transact the business to the best advantage. In doing this he undertook a very delicate trust: first, he was to make the most of the estate; then to deal with the several annuitants. This put him into very awkward circumstances, himself and Dawes being both considerable annuitants; and, therefore, when he undertook to deal with annuitants at large, he undertook a very nice charge, and it was incumbent on him to see with very great attention that he did not show more favor to the annuitants than he ought to do.

I certainly do not approve of Mackreth's conduct, when, after having recommended himself as a trustee for these purposes, he allowed the several annuities to stand as far as they had then gone, redeeming them only from that time. However, in fact, he bought the annuities on behalf of Fox, though with his own money; but, instead of considering them as discharged on the 24th of December, when he bought them, he considered them as bought for his own use, and treated them as existing annuities. *Here, therefore, he has gone beyond the line of delicacy; for this is a transaction that a Court of equity will never permit to stand. Here the Court will say he took an undue advantage of his situation. Yet it seems as if he thought this a fair mode of dealing in this sort of market. [*120]

In another instance he charged Fox more than he actually gave for the redemption of an annuity; and this part of the transaction must of necessity be rescinded, as Mackreth has acted *unfairly* in it; and Fox has the advantage of finding that Mackreth, after having recommended himself as a trustee, and undertaken to act faithfully for his cestui que trust has yet been dealing unfairly in this very article.

On the 16th of January it is allowed that Mackreth was a trustee of Fox, and whatever consequences arise from this character must belong to him. Considering him, therefore, as a trustee, see what he has done! First, he sent down a surveyor to the estate; but he has so managed this part of the case as to prevent the Court from seeing much into it. The Court will act temperately in its conjectures on this, but at the same time will impute all that it fairly can in point of suspicion. On one side it is said that Hampton was sent down to survey the estate with a view of enabling Mackreth to make the greatest advantage of it for his private benefit; but I do not think so. I think it ought to be taken that he had the estate surveyed as a *trustee*, in order that, in that character, he might know the real value of it, and thereby be better qualified to sell it to advantage. This, then, I consider as a part execution of his trust. But then Hampton's knowledge ought to be Fox's knowledge; and upon this arises a question which I think material—whether a trustee, gaining a knowledge of the subject in the execution of his trust and at the expense of the cestui que trust (for I suppose the expenses incurred by the trustee must fall ultimately on Fox,) and that knowledge consequently *belonging* to the cestui que trust, whether a trustee may not in *this respect* have the hand of justice laid upon him, if this knowledge is made use of by him to circumvent his cestui que trust, *so as to afford a distinct [*121] ground of fraud in a Court of equity? I am rather at a loss to find what the evidence affords to this point. It appears, however, that Hampton stayed on the estate till the 17th of January.

In these circumstances Mackreth began to deal with Fox, remaining in his character of a trustee. Fox had a valuation of the estate made by Jackman, which, though not very full or particular, yet afforded the general terms for a treaty and agreement; and it went generally to show that the estate was capable of being improved about 100%. per annum. On this valuation, lying in medio, one party says the estate is worth 47,000%. Mackreth reasons on this survey,

and says, first, that the houses are valued too high; secondly, that thirty-two years' purchase for the lands is too much; next, that forty years' purchase for the lord's rents is out of all sight. Thus running down the valuation made by Jackman, he argued down Fox, either from conviction or a sense of his distress, not indeed so low as 30,000*l.*, which Mackreth first proposed, but to a medium price of 39,500*l.*

The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger? for it has not been argued, I think, that, in the case of a stranger, this bargain could be rescinded. Now, to what conclusion does the character of trustee go in this case? *If a trustee, though strictly honest, buys an estate himself and then sells it for more, yet, according to the rules of a Court of equity, from general policy, and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes.* It is not, therefore, in that view, that Mackreth, being called a trustee, can operate. It does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a jurymen, pronounce that Fox agreed to the price, *trusting that Mackreth knew the price and represented it fairly to him?* If A. says to B., I know the value of the [*122] *subject, and, if you will trust me, I will fairly tell you what it is worth and A. at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against, not because A. is a trustee, but because he stipulated with B. to tell him fairly the value, and he broke that stipulation; and then, to be sure, it makes full as strong a case as that of a trustee. But was this the express or tacit understanding of the parties here? I have no materials to affirm this fact upon; at least I am considerably in doubt how to find any evidence of this, where one party asserts one sum to be the value of the estate, and the other another, and both try to make the best of the bargain. At the same time there are such circumstances respecting the manner in which Mackreth undertook the trust, as make me hesitate. All this makes the question of the real value of the estate extremely material.¹ I do not think it could have been sold at the time according to the rate of Jackman's valuation; and Mackreth's observations upon this seem to me to be well founded. No evidence has been adduced to show his valuation to be correct.

Now, see what follows on the 16th of January. Garforth was called up and desired to put their agreement into writing. I do not see why it was necessary that this memorandum should be signed by both parties. I at first thought it showed an eagerness to get the bargain made; but it seems it was agreed that more regular articles should be executed afterwards. The execution of these articles carried the transaction one step farther in point of form. Still, however, the conveyance was not executed. It is asked whether any man of

¹ Not for the purpose of the decision in a case between a trustee and his cestui que trust. See 8 Ves. 353; 9 Ves. 247.

honor would let Fox execute the deeds, after he had actually sold the estate for a much larger price? Many men, perhaps would do it; but I should never allow it to be the transaction of an honest man. Mackreth had forced himself into the confidence of Fox, and was called upon, by every tie of honor and honesty, to consider himself as a trustee; but my doubt is, whether this is not too general a line to lay down in a Court of justice.

*As to the manner of Mackreth's paying Fox the purchase-money, [*123] it has been much observed upon; but I do not see much in it. He had not the money by him, which may readily be supposed, but he gave an accountable note, with 5*l.* per cent. interest; and, to be sure, his note was just as good as a bond—very little danger of losing the money from a man of Mackreth's fortune; besides it was a sort of lien on the estate. The manner in which the accounts are made up by Mackreth is objected to, and it is said that this shows a confidence reposed in Mackreth by Fox. So it does; but the question is, whether this confidence is *ad idem*—whether it shows a confidence on the part of Fox, *that Mackreth would tell him the true value of the estate?*

It is then said, that he was called upon to do several subsequent acts; but these are to be so naturally accounted for by other circumstances, that I do not see how fraud can be inferred from these. They are then spoken of as instances in which Fox has confirmed the original purchase. As to confirmation, it has been considered by the Court in very different ways. In *Lord Chesterfield v. Janssen*, the Court did not go on confirmation as it is usually understood, but on this, that Mr. Spencer, with his eyes open, and after the death of the Duchess, and when his situation was totally changed, thought proper to confirm the former bargain. So, the judges assistant relied on this principally, and did not give much opinion on the former part of the case. I wish they had gone further; for as to the confirmation, he stood at that time under the former bonds. Another way in which confirmation operates is, by showing that the party then thinks himself to have been fairly dealt with. This occurs in the present case on the 28th of January. Again on the 25th of April, Fox did not see he had had any advantage taken of him. The use that I think is to be made of such confirmations is, as a proof that the party has seen no occasion to complain. In this view the present case is still stronger, for no complaint was made of this transaction till 1781; and, therefore, it is fair to infer that so notorious a disproportion of price as is now insisted [*124] upon was not within the suspicion of those who dealt for Mr. Fox; and it certainly would have been better if this suit had been brought earlier, for when are the affairs of mankind to be at rest? Nay, more than this, it is evident, and indeed not denied by the plaintiff's counsel, that the transaction never would have been impeached if Page had not given so large a price for the estate. This very much shakes my idea of the real value¹ of it. If this estate, situate near London, had really been sold at a great under-value, the friends of Mr. Fox must have known it by other means. Supposing the transac-

¹ The value, as before observed, was immaterial.

tion with Page to be purely accidental and not springing out of the actual value, it never can affect this question. At the same time it is observable that Mackreth has produced no evidence of the value of the estate, to show that it is not worth more than what he gave Fox.

I have been desirous of stating my thoughts on this case, that the gentlemen concerned may be apprised of them, as it will very possibly be necessary to have this matter discussed further, even before me. I have conversed with the Master of the Rolls and the judges, with a wish to find some rule of evidence on which I can go in this case, without running the hazard of shaking too much the contracts of mankind. It is of very little consequence to the public to lay down *definite* rules of *law*, if you have *indefinite* rules of *evidence*. I shall therefore at present only direct an inquiry into the real value of this estate; and if upon that inquiry the value should turn out to bear a considerable disproportion to what Mackreth gave for it, I shall probably require some assistance in laying down such rules of decision as will set men at ease as to the disposition of their property.

His Lordship, however, did not direct any such inquiry, but after a lapse of a considerable time affirmed the decree, saying only that he had considered the case very much, and that he could not see that his Honor's decree was wrong.

The defendant afterwards petitioned his Lordship for a rehearing of the appeal, but that petition was dismissed. See 2 Cox, 158. He then appealed [125] to the House of *Lords, assigning the reasons set forth in 2 Cox, 330; but on the 14th of March, 1791, the appeal was dismissed with costs. Id. 339; 4 Bro. P. C. 258, Toml. ed.

The well-known and thoroughly discussed case of *Fox v. Mackreth* is usually referred to as having established the rule ever since recognized and acted on by Courts of equity, viz. that a purchase by a trustee for sale from his cestui que trust, although he may have given an adequate price, and gained no advantage, shall be set aside at the option of the cestui que trust, unless the connection between them, most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to his cestui que trust. "It is founded," observes Lord Eldon, "upon this; that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence, in the power of the Court (by which I mean in the power of the parties,) in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and, by the knowledge acquired in that character, discovers a valuable coalmine under it, and, locking that up in his own breast, enters into a contract with the cestui que trust; if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded." *Ex parte Lacey*, 6 Ves. 627. Lord Thurlow, indeed, in *Fox v. Mackreth*, when he dissolved the injunction granted by the

Master of the Rolls, (see ante, p. 103,) and in his judgment, intimated an opinion that it was extremely material to ascertain the value of the estate purchased by Mackreth and Fox, his cestui que trust, and proposed to direct an inquiry for that purpose. Ultimately, however, he did not direct any such inquiry, and he afterwards admitted that he was wrong in dissolving the injunction. *Fox v. Mackreth*, therefore, was decided, not upon the ground that Mackreth had purchased the estate at an under-value, but that he had purchased it from his cestui que trust while the relation of trustee and cestui que trust continued to subsist between them, and without having communicated to Fox the knowledge of the value of the estate which he had acquired as trustee; for if the relation of trustee and cestui que trust had been clearly dissolved, and Mackreth had made Fox fully acquainted with the knowledge which he had acquired of the value of the estate, the purchase would not have been *set aside. "In the case of *Fox v. Mackreth*," says Lord Eldon, [*126] "so much referred to, and now become a *leading authority*, in which I have now Lord Thurlow's own authority for saying he went upon a clear mistake in dissolving the injunction, it was never contended that if Fox, in a transaction clear of suspicion, (but which must be looked at with the most attentive jealousy,) had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? because, being no longer a trustee, he was not under an obligation not to purchase. But we contended, that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox, that the trustee should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions: and we contended, that between the dates of Mackreth's taking upon himself the character of trustee and purchasing, he had acquired a knowledge of the value of the estate, by sending down a surveyor at the expense of the cestui que trust, which was not communicated to the cestui que trust even at the moment of the supposed dissolution of the relation between them; and, under these circumstances, we contended that Mackreth remained a trustee. This was the principle upon which the cause was decided. Either that cause ought to have been decided in favor of Mackreth, or this Court originally, and the House of Lords finally, were right in refusing an issue to try whether the estate was of the value Mackreth gave, or of a greater value at that time. Upon this principle, that was an immaterial fact: for, if the original transaction was right, it was of no consequence at what price he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstances, still it was gained for the benefit of the cestui que trust, not of the trustee:" *Ex parte Lacey*, 6 Ves. 627. Lord Eldon, upon several other occasions, in commenting on *Fox v. Mackreth*, most strongly insisted that the injunction was dissolved by mistake, and that the inquiry or issue which Lord Thurlow, although he ultimately refused it, at one time seemed inclined to grant, was pressed for by an argument based on a false principle, viz. that a fair price having been given in the first instance by Mackreth, he was therefore entitled to the benefit of

an accidental rise in the value of the property when he sold it to Page. "I believe," says his Lordship, "that a fair price was given in the first instance; that is, as good a price as, according to what was then known, could be [*127] obtained. But the purchaser had received his *information as to the value from a surveyor employed at the expense of the trust. In the judgment of this Court and the House of Lords, (certainly Lord Thurlow having doubt, to whose doubt the utmost respect is due,) Mackreth had not shaken off the character of trustee, but remained a trustee after he sold to himself; and the second sale was in equity to be considered as made, not by the purchaser, but by the trustee buying from himself; and, therefore, though the advantage was righteously obtained, it was obtained for the cestui que trust:" *Ex parte Bennett*, 10 Ves. 394.

It has, indeed, been asserted, that in *Whichcote v. Lawrence*, 3 Ves. 750, Lord Rosslyn considered, that, in order to set aside a purchase by a trustee, it is necessary to prove that an advantage has been gained by him. His Lordship, however, merely said, that he did not recollect any case in which the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser, and that it would be difficult for such a case to occur; for unless advantage was made, the act of purchasing would never be questioned, and Lord Eldon disavowed such an interpretation of Lord Rosslyn's doctrine: *Ex parte Lacey*, 6 Ves. 627. See also *Ex parte Bennett*, 10 Ves. 385; *Randall v. Errington*, 10 Ves. 423; *Kilbee v. Sneyd*, 2 Moll. 186; *Ex parte Badcock*, 1 Mont. & Mac. 239; *Hamilton v. Wright*, 9 C. & F. 111, 123, 124, 125. The director of a railway company being a trustee for the company, is as such precluded from dealing on behalf of the company with himself, or the firm of which he is a partner; *Aberdeen Railway Company v. Blakie*, 1 Macq. 461. That a trustee for sale cannot purchase for himself, whatever may be the nature of the property, real or personal, in addition to the cases already cited, see *Killick v. Flexney*, 4 Bro. C. C. 161; *Hall v. Hallet*, 1 Cox, 134; *Pike v. Vigors*, 2 Dru. & Walsh, 262; *Price v. Byrne*, cited 5 Ves. 681. Nor can a trustee for him, even at an auction: *Campbell v. Walker*, 5 Ves. 678; S. C., *Sanderson v. Walker*, 13 Ves. 601; *Randall v. Errington*, 10 Ves. 423; *Watson v. Toone*, 6 Madd. 153; *Baker v. Carter*, 1 Y. & C. Exch. Ca. 250. And a purchase from co-trustees is equally objectionable: *Hall v. Noyes*, cited 3 Ves. 748; S. C., 3 Bro. C. C. 483; *Whichcote v. Lawrence*, 3 Ves. 940. Nor will a purchase by trustees at a public auction be sustained; for if persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present, seeing the seller there to bid for the estate to or above its value, do not like to enter into that competition: *Ex parte Lacey*, 6 Ves. 629; *Ex parte James*, 8 Ves. 348; *Whichcote v. Lawrence*, 3 Ves. 740; **Attorney-General v. Lord Dudley*, Coop. 146. Nor can a trustee purchase before the Master under a decree for a sale. See *Price v. Byrne*, cited 5 Ves. 681; *Cary v. Cary*, 2 S. & L. 173; but see *Wren v. Kirton*, 8 Ves. 502. Nor can a trustee purchase as agent for another person: *Ex parte Bennett*, 10 Ves.

381, 400; *Gregory v. Gregory*, Coop. 204. Upon the same principle, an agent employed by a trustee in managing a sale cannot purchase: *Whitcomb v. Minchin*, 5 Madd. 91.

A mortgagee (*Downes v. Glazebrook*, 3 Mer. 200; *Waters v. Groom*, 11 C. & F. 684;) or an annuitant (*In re Bloye's Trust*, 1 Mac. & G. 488,) with power of sale, being in fact a trustee for sale, cannot, either directly or by means of his solicitor, except by the express authority of his cestui que trust, purchase the estate upon which the mortgage or annuity is a charge. Nor can the solicitor conducting the sale do so on his own account, at any rate without a full explanation to the parties interested, and putting them in full possession of the facts, and a knowledge that he was to become purchaser for himself. *Ib.*

A mortgagee, however, does not stand in a fiduciary position towards the mortgagor, so as to render a purchase of the equity of redemption from the mortgagor by the mortgagee impeachable. *Knight v. Majoribanks*, 2 Mac. & G. 10; and see *Webb v. Rorke*, 2 S. & L. 661, 673; *Waters v. Groom*, 11 C. & F. 684; *Dobson v. Land*, 8 Hare, 220. And there is no principle in equity that surviving partners cannot purchase the share of a deceased partner from his representatives. *Chambers v. Howell*, 11 Beav. 6, 14. Nor can a trustee take a lease from himself: *Attorney-General v. Earl of Clarendon*, 17 Ves. 500. And with so great jealousy does the Court look upon a trustee, because a lessee of the trust property, that even in a case where a testator had given a trustee power to become lessee, he was removed, principally upon the ground that he was placed in a position in which his interest, necessarily came in conflict with his duty. *Passingham v. Sherborn*, 9 Beav. 424.

But although a trustee cannot purchase from himself, he can purchase from a cestui que trust, who is sui juris, and has discharged him from the obligation which attached upon him as trustee. "Although," observes Lord Eldon, "a trustee who is intrusted to sell and manage for others undertakes, at the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself, it does not preclude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as trustee. The cestui que trust may, by a new contract, dismiss him from that character; but even then that transaction by which they *dismiss him must, according to the rules of the Court, be watched [*129] with infinite and most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the cestui que trust the Court can never be sure he has made, when entering into the new contract by which he is discharged." *Ex parte Lacey*, 6 Ves. 626. So, in the principal case, it was fully admitted that Mackreth might have dealt with Fox for the purchase of the trust estate, had he done so without taking an undue advantage of his position as trustee, and the knowledge he had acquired in that character. In *Coles v. Trecothick*, 9 Ves. 234, a purchase, by a trustee under a trust to sell for payment of debts, of the trust property, as agent of his father, both of whom were creditors and in

partnership, was sustained, upon the ground that the trustees did not appear to have interfered in the business up to the sale, otherwise than that they sanctioned the acts of the cestui que trust, and that the cestui que trust had full information, and the sole management of the sale, making surveys, settling the particulars, and fixing the prices of the lots, and specific performance of the agreement to purchase was decreed by Lord Eldon in favor of the trustee for sale. "As to the objection," observed his Lordship, "to a purchase by the trustee, the answer is, that a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee. I admit, it is a difficult case to make out, wherever it is contended that the exception prevails. The principle was clearly recognized in *Fox v. Mackreth*, and was established long before. The principle upon which I ever held that case right stands upon this only: not that Mackreth might not have purchased from Fox, and would not have been entitled to the increase; but that he had not been placed in circumstances to make that contract." See also *Morse v. Royal*, 12 Ves. 355, and *Clarke v. Swaile*, 2 Eden, 134, in both which cases purchases by trustees were, though with some reluctance, sustained.

Merely nominal trustees, as, for instance, a trustee who has disclaimed, without ever acting in the trust, may become a purchaser, (*Stacey v. Elph*, 1 My. & K. 195; *Chambers v. Waters*, 3 Sim. 42,) as may also a mere trustee to preserve contingent remainders: *Parkes v. White*, 11 Ves. 209, 226.

[*130] Under the statutes for the redemption of the land tax, the Lords *Commissioners are placed in the position of vendors; and therefore if trustees should purchase the property of the trust under those acts, as they would not be purchasing from themselves but from the Lords Commissioners, the transaction would be valid: *Beaden v. King*, 9 Hare, 499.

A trustee for infants or persons under disability cannot purchase the trust estate, unless by leave of a Court of equity, because persons not sui juris cannot enter into any contract with him which would have the effect of removing him from the character of trustee, which, as we have already seen, can be done by cestuis que trust, who are sui juris. The only terms upon which such trustees may purchase, "is a bill filed; and the trustee saying so much is bid, and that he will give more. The Court would examine into the circumstances; ask who had the conduct of the transaction; whether there is any reason to suppose the premises could be sold better; and, upon the result of that inquiry, would let another person prepare the particular, and let the trustee bid:" per Lord Alvanley, M. R., *Campbell v. Walker*, 5 Ves. 682; S. C., 13 Ves. 601. See also 1 Ball & B. 418.

The circumstance that two parties stand towards each other in the relation of trustee and cestui que trust does not affect any dealing between them unconnected with the subject of the trust: *Knight v. Majoribanks*, 2 Mac. & G. 10.

The doctrine which is applicable to purchases by trustees applies also to

purchases by persons acting in any fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.

An agent or solicitor employed to sell cannot purchase from his principal, unless he make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed; (*Lowther v. Lowther*, 13 Ves. 103; and see the great case of *The York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42, Toml. ed.; and see S. C., 3 Paton's Scotch App. Cas. 578, 579, where the judgments of Lord Thurlow and Lord Loughborough are given at length. *Watt v. Grove*, 2 S. & L. 492; *Whitcomb v. Minchin*, 5 Madd. 91; *Woodhouse v. Meredith*, 1 J. & W. 204; *Oliver v. Court*, 8 Price, 127;) and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent,—that he has made use of another person's name as the purchaser, instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in equity: *Trevelyan v. Charter*, 9 Beav. 140; *Charter v. Trevelyan*, 11 C. & F. 714; *Lewis v. Hillman*, 3 H. L. Cas. 607. See *also *Murphy v. O'Shea*, 2 J. & L. 420, in which case it was argued that there was no proof [*131] that lands were sold to an agent at an under-value. Sir Edward Sugden, L. C., however, observed, "It is perfectly well settled that it is not necessary to prove under-value. A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever may have been the price obtained for the property." In *Crowe v. Ballard*, 3 Bro. C. C. 117, Lord Thurlow thought that the person employed to sell could not be permitted to buy, and even if that were done with the knowledge of the party selling, it could not be supported; and that the principle must prevail, even if he had bought fairly. Lord Thurlow, however, it is conceived, did not mean to lay down, as a general rule, that an agent could in no case purchase from his principal; he spoke probably with reference to the case he was deciding, which was one of gross fraud: at any rate, it is clear now, that an agent to sell can purchase from his employer, if he comply with the rule laid down in *Lowther v. Lowther*. "The rule of the Court," observes Sir Edward Sugden, L. C. of Ireland, "does not prevent an agent from purchasing from his principal, but only requires that he shall deal with him at arm's length, and after a full disclosure of all that he knows with respect to the property." *Murphy v. O'Shea*, 2 J. & L. 425: [See *Casey v. Casey*, 14 Illinois, 412.]

If an agent employed to make a purchase purchases for himself, he will be held a trustee for his principal: *Lees v. Nuttall*, 1 Russ. & My. 53; S. C., 1 Tambl. 282. So, also, if he is employed to obtain a lease, he shall not take it for his own benefit: (*Taylor v. Salmon*, 4 My. & Cr. 134;) nor will an agent employed to settle a debt due from his principal be permitted to derive any benefit from it by purchasing it himself; because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of

the debt he was employed to settle, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle: if, therefore, an agent obtained under these circumstances an assignment of a debt due from his principal, he would be held a trustee for his principal, and would only be entitled to the sum he actually paid for the debt: *Reed v. Norris*, 2 My. & Cr. 374.

Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit by becoming a seller to him. This doctrine is recognized by Lord Thurlow in *East India Company v. Henchman*, *1 Ves. jun. 289, where he observes, "If, being [*132] a factor, a man buy up goods which he ought to furnish as factor, and instead of charging portage duties, or accepting a stipulated salary, he take the profits, and deal with his constituent as a merchant, this is a fraud for which an account is due."

Upon the same principle, where one of several partners was employed to purchase goods for the firm, and he, unknown to his co-partners, purchased goods of his own at the market price, and made considerable profit thereby: It was held by Sir J. Romilly, M. R., that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made: *Bentley v. Craven*, 18 Beav. 75; *Williams v. Trye*, Ib. 366, 371. See also, *Beck v. Kantorowicz*, 3 K. & J. 230. So, also, in *Massey v. Davies*, 2 Ves. 317, an agent for a colliery, who it was stipulated was to have no emolument beyond his salary, was decreed to account for the profits made by selling to his principal, timber belonging to himself and another person, with whom he had clandestinely entered into partnership, under the name of that person. In this case the partner was held to have no knowledge that the agent was acting contrary to his trust; otherwise he would have been held bound, for not only the agent acting contrary to his trust, but a man who, knowing the agent to be guilty of a breach of trust, entered into a transaction with him, will be answerable.

Upon the same principle where a person is employed as a stock-broker, if he himself purchase the stock of his employer, or sell his own stock to him, without his knowledge, such sales and purchases will be set aside. See *Brookman v. Rothschild*, 3 Sim. 153; 2 D. & C. 188; 5 Bligh. N. S. 165. So in *Gillett v. Peppercorne*, (3 Beav. 78,) the plaintiff employed the defendant, a stockbroker, to purchase some canal shares, and he bought them from a person who though ostensibly owner was a mere trustee for himself: Lord Langdale, M. R., set aside the sale with costs. "It is said," observed his Lordship, "that this is every day's practice in the city. I certainly should be very sorry to have it proved to me that such a sort of dealing is usual; for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent, has himself in the very transaction an interest directly opposed to

that of his principal." See also, *The Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 35, 46. See Sug. Prop. 662.

A solicitor having, under a decree, the conduct of a sale, is under an *absolute incapacity to purchase at it: *Atkins v. Delmege*, 12 Ir. [*133] Eq. Rep. 1.

An agent or steward may take a lease from his employer or principal; (*Lord Selsey v. Rhoads*, 2 S. & S. 41; 1 Bligh, N. S. 1;) but it must always be difficult to sustain such a lease in a court of equity, as it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith: *Malony v. Kernan*, 2 D. & W. 31.

Where a surety gets rid of, and discharges an obligation, at a less sum than its full amount, he will not be allowed, as against his principal, to make himself a creditor for the whole amount, but only for the amount which he has actually paid in discharge of the common obligation: *Reed v. Norris*, 2 My. & Cr. 361, 375; *Ex parte Rushforth*, 10 Ves. 420; *Butcher v. Churchill*, 14 Ves. 567.

Executors or administrators will not be permitted, either immediately or by means of a trustee, to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate, and must account to the utmost extent of the advantage made by them of the subject so purchased: *Hall v. Hallet*, 1 Cox, 134; *Killick v. Flexney*, 4 Bro. C. C. 161; *Watson v. Toone*, 6 Madd. 153; *Kilbee v. Sneyd*, 2 Moll. 186; *Baker v. Carter*, 1 Y. & C. Exch. Ca. 250; *Naylor v. Winch*, 1 S. & S. 566; *Cook v. Collingridge*, Jac. 607; *Wedderburn v. Wedderburn*, 4 My. & Cr. 41. So, if they compound debts or mortgages, or buy them in for less than is due upon them, they will not be allowed to retain any benefit from the transaction for themselves, but for the estate. See *Anon.*, Salk. 155; *Ex parte James*, 8 Ves. 346; *Ex parte Lacey*, 6 Ves. 628.

Assignees of a bankrupt cannot in any case purchase his property. This may be laid down as a general rule, which will be more peculiarly applied with unrelenting jealousy, from the impossibility of reaching the transaction, and, moreover, because the assignee has the bankrupt and his property altogether under his own disposal; (see *Ex parte Chadwick*, cited in Montague and Ayrton's book on Bankruptcy, vol. 1, 329, 2d ed.; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 337; *Ex parte Tanner*; *Ex parte Attwood*; *Owen v. Foulkes*, 6 Ves. 630, n.; *Ex parte Bage*, 4 Madd. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Turner v. Trelawny*, 12 Sim. 49; *Ex parte Thwaites*, 1 M. & A. 323; *Ex parte Alexander*, 2 M. & A. 492;) nor can his partner buy: *Ex parte Burnell*, 7 Jur. 116. In *Whelpdale v. Cookson*, 1 Ves. 9, 5 Ves. 682, Lord Hardwicke confirmed a sale of a bankrupt's estate to an assignee, in case the majority of the creditors should not dissent; but Lord Eldon, *in *Ex parte Lacey*, 6 Ves. 628, doubted the authority of that case. "If," said his Lord- [*134] ship, "the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arises from the difficulty of a cestui que trust duly informing himself which is most or

least for his advantage, I have considerable doubt whether the majority in that article can bind the minority :'' *Ex parte Thwaites*, 1 M. & A. 323. But, in a recent case, on payment of costs, a purchase by an assignee on being found beneficial by the Court was confirmed; (*Ex parte Gore*, 6 Jur. 1118; 3 M. D. & De G. 77; 7 Jur. 136;) and an assignee has been removed by the Court in order that he might bid at a sale of the bankrupt's estate; (*Ex parte Perks*, 3 M. D. & De G. 385;) and in a case where the Court refused to allow an assignee to bid, he was allowed to name the price he would give if the property were not sold by auction, and afterwards to buy at that price : *Ex parte Holyman*, 8 Jur. 156.

As to the purchase of debts due from the bankrupt by the assignee, it has been decided, that, as assignees cannot buy the estate of the bankrupt, so, also, they cannot for their own benefit buy an interest in the bankrupt's estate, because they are trustees for the creditors. In that respect there is no difference between assignees and executors, who cannot for their own benefit buy the debts of the creditors; for although, in a moral point of view, such a transaction may not be blameable, still the Court, considering that, unless the policy of the law made it impossible for them to do anything for their own benefit, it was impossible to see in what cases the transaction was morally right, and also the prodigious power of the assignees, connected with solicitors under the commission, and bankers receiving the money, over the creditors and the bankrupt, has held the assignee a trustee of the debts purchased by him for the benefit of those entitled to the interest in the residue, the creditors or the bankrupt, as the case may be : *Ex parte Lacey*, 6 Ves. 628. Solicitors to the commission cannot purchase : *Owen v. Foulkes*, 6 Ves. 630; *Ex parte Linwood*, cited 8 Ves. 343; *Ex parte Town*, 2 M. & A. 29; *Sidny v. Ranger*, 12 Sim. 118.

The rule affecting assignees of bankrupts applies with equal force to a commissioner of bankrupts : *Ex parte Bennett*, 10 Ves. 381; *Ex parte Harrison*, 1 Buck. 17; *Ex parte Dumbell*, Mont. 33, cited in notes.

A solicitor is not incapable of contracting with or purchasing from his client; but inasmuch as the parties stand in a relation which gives, or may give, the solicitor an advantage over the client, the onus lies on the solicitor to prove that the transaction was *fair: *Montesquieu v. Sandys*, 18 [*135] Ves. 302; *Cane v. Lord Allen*, 2 Dow. 289; *Champion v. Rigby*, 1 Russ. & M. 839; *Edwards v. Meyrick*, 2 Hare, 60. In the case of *Gibson v. Jeyes*, 6 Ves. 266, where Jeyes, an attorney, sold an annuity to his client, this subject was much considered by Lord Eldon : "An attorney," says his Lordship, "buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. That must be the rule. If it appears that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand. The principle so stated may bear hard in a particular case; but I must lay down a general

principle, that will apply to all cases; and I know of none short of that, if the attorney of the vendor is to be admitted to bargain for his own interest, where it is his duty to advise the vendor against himself." And in another part of his judgment his Lordship observes, "If he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given against a third person. It is asked, where is that rule to be found? I answer, in that great rule of the Court, that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." See also, *Austin v. Chambers*, 6 C. & F. 1, 37; *Trevelyan v. Charter*, 9 Beav. 140; S. C., 11 C. & F. 714; *King v. Savery*, 1 Sm. & G. 271; S. C., nom. *Savery v. King*, 5 H. L. Cas. 627, 656, 665; *Bellamy v. Sabine*, 2 Ph. 425; *Holman v. Loynes*, 4 De G. Mac. & G. 270; *Salmon v. Cutts*, *Cutts v. Salmon*, 4 De G. & Sm. 125; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Waters v. Thorn*, 22 Beav. 547; *Spencer v. Topham*, *Ib.* 573. But the rule laid down by Lord Eldon will not apply, if the solicitor does not act in such capacity in *hâc re*: *Cane v. Lord Allen*, 2 Dow, 289; *Edwards v. Meyrick*, 2 Hare, 68. In *Montesquieu v. Sandys*, 18 Ves. 302, the purchase of a reversionary interest, viz., a second presentation to a living, after the death of the then incumbent, by an attorney, from his client, though advantageous in the end, was sustained, no fraud or misrepresentation being proved, and the proposal coming from the client, both the attorney and client being ignorant of the real value. See *Hesse v. Briant*, 2 Jur. N. S. 922.

*Although a person may have ceased to act as attorney for another, if by means of former transactions, while holding that character, he [*136] had acquired, at the expense of his client, a knowledge of the value of his property which the client had not, he will not be able to sustain any contract relative to such property, if he concealed from his former client the knowledge so obtained: *Cane v. Lord Allen*, 2 Dow, 294; *Montesquieu v. Sandys*, 18 Ves. 308; *Ex parte James*, 8 Ves. 352. If, however, such knowledge were communicated to the former client by the attorney, the parties would be placed upon an equality, and such communication being proved, the difficulty, quoad hoc, would be removed: *Edwards v. Meyrick*, 2 Hare, 69.

So, likewise, the employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates, without his permission; and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate. Thus in *Carter v. Palmer*, 1 Dru. & Walsh, 722, 8 C. & F. 657, C., a barrister who had been for several years confidential and advising counsel to P., and had by reason of that relation acquired an intimate knowledge of his property and liabilities, and was particularly consulted as to a compromise of securities given by P. for a debt which C. considered not to be recoverable to the full amount, purchased those securities for less than their nominal amount, without notice to P.; it was held by Lord Plunket, and by the House

of Lords on appeal, that C.'s purchase, while the compromise proposed by P. was feasible, was in trust for P.; and that C. was entitled only to the sum he had paid, with interest. "The several cases," observes Lord Cottenham, (8 C. & F. 707,) "which have occurred in which solicitors have been restrained from acting against their former clients, or communicating information acquired in such employment, proceed upon a principle which governs this case; for it cannot be contended that they are at liberty to use for their own benefit, and to the prejudice of their former clients, information acquired whilst acting for them, which they are not permitted to communicate or to use for the benefit of others. I am therefore of opinion that Mr. C. had been incapacitated by the character of his employment from purchasing, for his own benefit, these securities upon his employer's property, and that such incapacity continued at the time of his purchase, and consequently that he is to be considered as having so purchased for the benefit of his former employer."

In *Greenfield v. Bates*, 5 Ir. Ch. Rep. 219, a solicitor purchased [*137] *a leasehold interest from his client, and himself prepared the assignment, which contained no covenant to indemnify the vendor, but did contain the words "subject to rent and covenants," in the lease. It was held by Lord Chancellor Brady that the executor of the solicitor was bound to indemnify the vendor against the rent and covenants.

A person chosen as arbitrator cannot buy up the unascertained claims of any of the parties to the reference; for, to use the words of Lord Mannors, "that he should purchase an interest in those rights upon which he was to adjudicate, could not be endured. It would indeed be to corrupt the fountain, and contaminate the award:" *Blennerhassett v. Day*, 2 Ball & B. 116.

Upon the same principle, a judgment delivered by a judge, who has an interest in the subject-matter of the suit, will be set aside. See *Dimes v. Proprietors of the Grand Junction Canal*, (3 H. L. Cas. 759,) there it was held that a judgment of Lord Cottenham, C., assisted by Lord Langdale, M. R., (2 Mac. & G. 285,) in which, affirming the decision of the court below, he had decided in favor of a company in which he was a share-holder to the amount of several thousand pounds, ought to be reversed. "No one," said Lord Campbell, "can suppose that Lord Cottenham could be in the remotest degree influenced by the interest he had in this concern; but it is of the last importance that the maxim that no man is to be a judge in his own cause, should be held sacred. . . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

So, where an Act of Parliament empowered a rector, with the consent of the bishop, who was patron of the living, to raise money by annuity for building a new rectory-house, the plan and accounts of which were to be approved of by the bishop. The bishop advanced the necessary money, and obtained a grant of the annuity charged on the living. The bishop being placed in the position of a trustee to protect the interests of the rectory, it was held, by Lord Langdale, M. R., that he could not become the purchaser of the annuity; and that the transaction, although there was no unfairness in it, could not stand, because

it was a clear violation of those rules which have been established for the defence of those whose interests and property have been committed to the protection of persons placed in a fiduciary situation : *Greenlaw v. King*, 3 Beav. 49. See also *Grover v. Hugell*, 3 Russ. 428.

A tenant for life, however, may purchase or take in exchange lands from trustees, in whom they are vested with a power of sale and *exchange, [*138] with his consent and direction, (*Howard v. Ducane*, 1 T. & R. 81,) but this case has been put entirely upon the practice of conveyancers ; *Grover v. Hugell*, 3 Russ. 432 ; though probably it might be better rested upon the principle that as the trustees were the vendors, their intervention to check and control the transaction, was quite sufficient to take the case out of the operation of the rule preventing a person in a fiduciary position from purchasing from himself. See *Beaden v. King*, 9 Hare, 499.

A power of sale given without restriction to a party having a limited interest only, may well be held to impart a negative upon the power of the same party to buy, for the power to sell is in the nature of a trust ; but as the rule does not extend to prevent, in all cases, a party having a power to sell, from becoming a purchaser ; so neither, where there is a restriction upon the power of sale, is the party having the power to sell in all cases at liberty to become the purchaser. It must, in each case, depend upon the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. In the proportion in which the power is restricted, the danger incident to allowing the donee to purchase is diminished : per Sir G. Turner, V. C., 9 Hare, 519.

A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. "The case of trustees," observed Sir Thomas Plumer, M. R., "is quite different ; with respect to them, the principle is, that the same person shall not be buyer and seller ; but here the sheriff is the seller : " *Stratford v. Twynam*, Jac. 421 ; and it has been held that a mere creditor, having his debt secured by an agreement from the debtor to convey an estate upon trust for the creditor to sell, and amongst others to pay his own debt, is not in such a fiduciary position as to be disabled from purchasing the estate from the agent of his debtor : *Chambers v. Waters*, 3 Sim. 42 ; Coop. Cas. temp. Brougham, 91 ; S. C., nom. *Waters v. Groom*, 11 C. & F. 684.

With regard to transactions between guardian and ward, Lord Hardwicke observed, in *Oldin v. Sambourn*, 2 Atk. 15, that it was improper for a guardian to purchase his ward's estate immediately upon his coming of age. But although it has a suspicious look, yet if he be paid the full consideration, it is not voluntary, and cannot be set aside. See *Hylton v. Hylton*, 2 Ves. 549. In *Carey v. Carey*, 2 S. & L. 173, leaseholds belonging to an infant were sold under a decree of the Court, and purchased by his guardian in the suit, who acted also as receiver. The sale was set aside, although *the full [*139] value was given, and decreed fraudulent and void, it being wholly unnecessary, as there were funds sufficient for the purposes to which the purchase-money was to be applied ; and the old lease having been surrendered, and a new one obtained, it was declared to be held in trust for the persons en-

titled to the former lease. See also *Dawson v. Massey*, 2 Ball & B. 219. And Lord St. Leonards says, with reference to Lord Hardwick's observation in *Oldin v. Sambourn*, that "it seems clear that such a purchase would now be set aside on general principles, without reference to the adequacy of consideration." Sugd. V. & P. 596, 13th ed.

If a guardian buys up incumbrances upon his ward's estate at an under-value, he will be held a trustee for his ward, and can only charge him with what he has actually paid: *Henley v. —*, 2 Ch. Ca. 245.

The principle of these cases has been acted upon by the Legislature, which, under the General Inclosure Act, has rendered commissioners incapable of purchasing *any* estate in the parish in which an inclosure is made until five years after the date and execution of the award, (41 Geo. 3, c. 109, s. 2.) And under the Commons Inclosure Act, a similar prohibition prevents valuers from purchasing land until after seven years from the confirmation of the award, (8 & 9 Vict. c. 118, s. 219.)

It may here be mentioned that where no fiduciary relation exists between the parties, in the absence of fraud, mere inadequacy of consideration, although the vendor may have no professional adviser, will not be a sufficient reason for setting aside a sale: *Harrison v. Guest*, 6 De G. Mac. & G. 424.

Nature of Relief granted by Courts of Equity.—It remains to consider the nature of the relief a Court of equity will grant against a trustee or other person who has made a purchase which is improper, according to the rules before laid down, and upon what terms that relief will be granted.

The cestui que trust, if he wishes it, can insist upon a re-conveyance of the property from the trustee who purchased, if it remains in his hands unsold; (*York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42, Toml. ed; *Lord Hardwicke v. Vernon*, 4 Ves. 411; *Randall v. Errington*, 10 Ves. 423; *Hamilton v. Wright*, 9 C. & F. 123; (or from a person who has purchased from him, with notice: *Attorney-General v. Lord Dudley*, Coop. 146: *Dunbar v. Tredennick*, 2 Ball & B. 304. But the re-conveyance will only be decreed upon the terms of his repaying the purchase-money, with interest at 4l. per cent., and all sums which may have been expended in repairs and improvements of a permanent and lasting nature, and also such as have a tendency to [*140] bring the *estate to a better sale. On the other hand, there must be an allowance for acts that deteriorate the value of the estate, and the trustee must account for all rents received by him, and for all profits, such as money arising from the sale of timber; and he must also pay an occupation rent for such part of the estate as may have been in his actual possession: *Hall v. Hallet*, 1 Cox, 134; *Ex parte Hughes*, 6 Ves. 624, 625; *Campbell v. Walker*, 5 Ves. 682; *Ex parte Bennett*, 10 Ves. 400, 401; *Robinson v. Ridley*, 6 Madd. 2; *Ex parte James*, 8 Ves. 351; *Ex parte Lacey*, 6 Ves. 630; *Watson v. Toone*, 6 Madd. 153; *York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42, Toml. ed.; *Mill v. Hill*, 3 H. & Cas. 869.

If the cestui que trust does not wish for a re-conveyance of the property, an order will be made, that the expense of repairs and improvements not only substantial and lasting, but such as have a tendency to bring the estate to a

better sale, after making an allowance for acts that deteriorate the value of the estate, shall be added to the purchase-money, and that the estate shall be put up at the accumulated sum; if any one makes an advance upon that sum, the trustee shall not have the estate; if no one does, he will be held to his purchase; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*; *Ex parte Lacey*; *Lister v. Lister*, 6 Ves. 617, 625, 631; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Hewitt*, 2 Mont. & Ayr. 477; but where the trustee has bought the estate in one lot, and the cestuis que trust are desirous of having it sold in several lots, the cestuis que trust must first repay him all the money he has advanced, with interest, he accounting for the rents received by him, or paying an occupation rent, if he actually occupied the estate; *Ex parte James*, 8 Ves. 351.

Although the purchaser has paid the purchase-money into Court, and it has been invested in the funds, he will not be entitled to any benefit from any advance in the funds, but to his purchase-money and interest only; for, if the stock had fallen, instead of advancing, he could not have been compelled to take it; *Ex parte James*, 8 Ves. 351.

Where the trustee has *resold* the estate, the cestui que trust can, as in the principal case, make him account for what he has received over and above the purchase-money he himself paid, with interest at 4l. per cent.; *Ex parte Reynolds*, 5 Ves. 707; *Hall v. Hallett*, 1 Cox, 134.

The costs of the suit, where the sale is set aside, must be paid by the trustee; (*Sanderson v. Walker*, 13 Ves. 601; *Hall v. Hallett*, 1 Cox, 141; *Whichcote v. Lawrence*, 3 Ves. 740; *Dunbar v. Tredennick*, 2 Ball & B. 304: see, however *Baker v. Carter*, 1 Y. & C. Exch. Ca. 250;) unless [*141] there has been *great delay on the part of the cestui que trust; *Attorney-General v. Lord Dudley*, Coop. 146. And even if the cestui que trust fails to set aside the sale, on account of his own delay, the Court may refuse the trustee his costs: *Gregory v. Gregory*, Coop. 201; *Champion v. Rigby*, 1 Russ. & My. 539.

Acquiescence.—Acquiescence for a long time in an improper sale will disable a person from coming into a Court of equity to set it aside: *Morse v. Royal*, 12 Ves. 355; *Price v. Byrne*, cited with approbation by Lord Alvanley in *Campbell v. Walker*, 5 Ves. 681; *Champion v. Rigby*, 1 Russ. & My. 539; *Roberts v. Tunstall*, 4 Hare, 257; *Beaden v. King*, 9 Hare, 499, 532; *Baker v. Read*, 18 Beav. 398. But “to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers,” per Sir William Grant, M. R., in *Randall v. Errington*, 10 Ves. 428: see also *Chalmer v. Bradley*, 1 J. & W. 51; *Trevelyan v. Charter*, 9 Beav. 140; S. C., 11 C. & F. 714; *Savery v. King*, 5 H. L. Cas. 627, 667; but see and consider *Knight v. Majoribanks*, 11 Beav. 322, 2 Mac. & G. 10; and the distress of the cestui que trust may be an excuse for acquiescence; (*Gregory v. Gregory*, Coop. 201; *Roche v. O’Brien*, 1 Ball. & B. 342;) but it has been held that laches does not apply to a body of creditors, to whom relief will be granted when it would be refused to an individual: see case in the Exchequer, cited 6 Ves.

632; *Whichcote v. Lawrence*, 3 Ves. 740; *York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42, Toml. ed.

Although acquiescence in an improper sale may have the effect of not enabling a party to set it aside, it nevertheless will not be sufficient to induce a Court of equity to exercise its discretionary power of compelling specific performance of the agreement to sell: *Salmon v. Cutts*, *Cutts v. Salmon*, 4 De G. & Sm. 125.

Confirmation.]—A cestui que trust may confirm an invalid sale, so that he cannot afterwards set it aside: *Morse v. Royal*, 12 Ves. 355; *Roche v. O'Brien*, 1 Ball. & B. 353. But, in order to constitute a valid confirmation, a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction: *Murray v. Palmer*, 2 S. & L. 486; *Dunbar v. Tredennick*, 2 Ball & B. 317; *Malony v. L'Estrange*, 1 Beat. 413; *Adams v. Clifton*, 1 Russ. 297; *Cockerell v. Cholmely*, 1 Russ. & My. 425; *Chalmer v. Bradley*, 1 J. & W. 51; *De Montmorency v. Devereux*, 7 C. & F. 188; *Salmon v. Cutts*, 4 De G. & Sm. 129; *Stump v. Gaby*, 2 De Gex. Mac. & G. 623; *Waters v. Thorn*, 22 Beav. 547. Nor will the act of confirmation [*142] be valid, if it be done in distress and difficulties, under the force, pressure, and influence of the former transaction; *Crowe v. Ballard*, 3 Bro. C. C. 139; *Wood v. Downes*, 18 Ves. 128; *Roche v. O'Brien*, 1 Ball & B. 330; *Roberts v. Tunstall*, 4 Hare, 257,) and it must be an act separate and distinct from the impeachable transaction, and not, as in the principal case, a conveyance executed in consequence of a contract or covenant connected with it: *Morse v. Royal*, 12 Ves. 370; *Wood v. Downes*, 18 Ves. 124, 128; *Roche v. O'Brien*, 1 Ball & B. 338. A confirmation of an invalid sale, by the majority of the creditors of a bankrupt, will not be binding upon the minority: see *Ex parte Lacey*, 6 Ves. 628; *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622, overruling *Whelpdale v. Cookson*, cited in *Campbell v. Walker*, 5 Ves. 682; S. C., 1 Ves. 9; *Ex parte Thwaites*, 1 M. & A. 323; *Tommey v. White*, 3 H. L. Cas. 49.

The equitable maxim that a trustee is disabled to purchase, for his own benefit, at a sale of the trust property, has two applications, which, though embraced under the same conception of duty and policy, are so far distinguished in their circumstances and appearance, that it is better to state them separately. (1.) One of them is derived from the general and fundamental principle in the doctrine of trusts, which was mentioned in the note to *Keech v. Sandford*, ante, that a person assuming a fiduciary relation

towards another, in regard to property, is bound to exercise for the benefit of his cestui que trust, all the rights, powers, knowledge, and advantages of every description, which he derives from that position, or acquires by means of it; at least he is disabled from exerting them for his own private benefit. (2.) The other is the more specific and positive rule, that an agent to sell for others, though he have but a mere ministerial power for that single purpose, is disabled from being a purchaser at the sale. His

duty, as vendor for others, is to sell the property for the highest price, and his interest, as purchaser for himself, is to get it for the lowest; and these two relations are so essentially repugnant, that a court of chancery never allows them to be united in the same person. A sheriff or commissioner, or other judicial or ministerial officer, buying at the sale which he is appointed to conduct, is an instance under the latter rule: where a general trustee purchases trust property at a sale under adverse process with which he has no connexion, we find an illustration of the former principle, to which the other does not extend: in the case of a trustee purchasing at his own sale, the two run together. But though, for clearness and certainty in practice, this distinction between the larger and narrower application of the maxim should be observed, the equitable notion of a trust is so comprehensive, that all of these cases are embraced under the same head in chancery, and all of them are dealt with, in precisely the same manner. The relief in equity proceeds upon the same method: without any reference to fraud, and without any inquiry into circumstances, it touches with a trust, alike, the office of the fiduciary and the power of the agent: at the option of the parties interested, it converts the purchase into a trust for them, and gives them the choice of confirming the sale, or of having the property resold for their benefit, upon terms of the trustee's being compensated for what he has expended. "There is no magic in the terms *trust* and *trustee*," said the counsel in the case of *The York Buildings Company v. Mackenzie*, 8 Tomlin's Brown's P. C. 42, 64: "He is a trustee, in

technical style, who is vested with property *in trust for others*; but every man has a *trust*, to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission."

Understanding, then, by a trustee, any one who acts representatively, or whose office is to advise or operate, not for himself, but for others, the principle is general, that a trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trust, without the consent of all the persons interested: and this principle applies to executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who, in any respect, have a concern in the sale of the property of others; it extends to sales by public auction, and to judicial sales, as well as to private ones; and applies to purchases, direct and indirect, in person, or through an agent, or by the medium of a person who subsequently re-conveys to the trustee, and to purchases made by the trustee as agent for a third person, and to purchases in which he is to have a partial interest as well as those in which he is exclusively concerned.

Salle v. Craft, 7 Richardson, Eq. 34; *Mulford v. Bowen*, 1 Stockton, 797.

"No person," according to the expression approved in *Torrey v. Bank of Orleans*, 9 Paige, 650, 763, in *Van Epps v. Van Epps*, Id. 238, 241; in *Cram v. Mitchell and others*, 1 Sandford, 251, 256; in *Dobson v. Racey*, 3 Id. 61; and in *Voorhees v. The Presbyterian Church of Amsterdam*, 8 Barbour's S. Ct. 136, 142, "can become a purchaser of an interest in pro-

perty, where he has a duty to perform which is inconsistent with the character of a purchaser:" or, in other words, wherever it is the duty or undertaking of a person to advise or act for the purpose of obtaining the highest price for the property, there is an incapacity in that person to be a purchaser, under any form, or to any extent, except by consent of the *cestui que trust*, because the interest and effort of the purchaser is to obtain the property at the lowest price. This great pervading principle of equity was explained and vindicated with equal elegance and ability in *Davoue v. Fanning*, 2 Johnson's Chancery, 252; and has been again copiously illustrated in the late case of *Michoud et al. v. Girod et al.*, 4 Howard's S. C. 503, 553; and is recognized and adopted in every equitable jurisdiction in this country; see *Campbell v. Pennsylvania Life Ins. Co.*, 2 Wharton, 53, 63; *Leisenring v. Black*, 5 Watts, 303, 304; *Litchfield v. Cudworth*, 15 Pickering, 24, 31; *Shelton v. Homer and others*, 5 Metcalf, 462, 467; *Caldwell v. Sigourney*, 19 Connecticut, 37, 51; *Thorp et al. v. M^cCullum et al.*, 1 Gilman, 615, 625; *Brackenridye v. Holland*, 2 Blackford, 377; *Pitt v. Petrovy*, 12 Iredell, 69; *Boyd v. Hawkins*, 2 Devereux's Equity, 195, 207; *Wormley v. Wormley*, 8 Wheaton, 422, 441; &c. It matters not, that there was no fraud contemplated, and no injury done: the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it: it is one of those processes, derived from the system of trusts, by which a court of chancery turns parties away from wrong, and from the power of doing wrong, by making their act instantly enure in equity to rightful pur-

poses. The cases are uniform in declaring that it matters not how innocent and bona fide, and free from suggestion of fault, the transaction may be; *Shelton v. Homer and others*; *Dobson v. Racey*, 3 Sandford, 61; *Wade v. Harper*, 3 Yerger, 383, 385; *Scott et al. v. Freeland*, 7 Smedes & Marshall, 410; *Brothers v. Brothers*, 7 Iredell, Eq. 150; *Mason v. Martin*, 4 Maryland, 124; *Zimmerman v. Marmon*, 4 Richardson's Eq. 165; nor how harmless or even beneficial the interference of the trustee may have been; *Leisenring v. Black*, 5 Watts, 303, 304; *Campbell v. Johnson and others*, 1 Sandford, 148, 152; *Saltmarsh v. Beene*, 4 Porter, 283, 293: the trustee can never, by his own act, shake off the equity of the *cestui que trust* to have the benefit of all that he does in the scope of the trust, and the *cestui que trust* may come into equity, as of course, and, without the imputation either of fraud or injury, ask for a resale of the property; and whether the property was or was not worth more than the amount of the trustee's bid, is a matter which is never inquired into; *Torry v. Bank of Orleans*, 9 Paige, 650, 664; *Van Epps v. Van Epps*, Id. 238, 242. In the pointed language of the court in *Brothers v. Brothers*, the sale is set aside, not because there is, but because there may be fraud; *Brothers v. Brothers*, 7 Iredell, Eq. 156; *Patton v. Thompson*, 2 Jones, Eq. 285. In explaining the reasons and operation of this principle, successive judges have only been able to vary and impair the language of the counsel for the appellants, (Messrs. R. Dundas, J. Mansfield and J. Mackintosh,) in the case of *The York Buildings Company v. Mackenzie*, 8 Tomlins' Brown, 42,

63. "The ground on which the disability or disqualification rests," it was there argued, "is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the *danger* is *imminent*, and the *security* against discovery *great*, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation." The practice established in chancery, of giving the *cestui que trust* an option to affirm the purchase, or to have the property resold, unites practical convenience with exact justice to both of the principal parties: if the property brought its full value, the *cestui que trust* will have no motive for disturbing the transaction; if less, it is just that the difference should enure to his benefit, and not to the trustee's; and the trustee never suffers, for he is always allowed to hold his purchase as a security for what he has expended upon it: *Ro-*

gers v. Rogers, 1 Hopkins, 515, 525. [And the better opinion would seem to be that the same rule is applicable to mortgagees, and other creditors who are armed with a power of sale, and thus enabled to control the disposition of lands or chattels which have been pledged or mortgaged to them for debts, because they might otherwise be gainers by buying the property for less than it is worth, and looking to the personal responsibility of the debtor for the residue, and should consequently be placed beyond the reach of temptation; *Hyndman v. Hyndman*, 19 Vermont, 9; *Shee v. The Manhattan Co.*, 1 Paige, 48; *Hoyt v. Martinsee*, 2 Smith's Court of Appeals R. 231. Thus in *Shee v. The Manhattan Co.*, and *Hoyt v. Martinsee*, the assignment of a mortgage as collateral security was said to create a trust for the payment of the debt, and to make it the duty of the assignee to reconvey the mortgaged premises, which he had bought in under a decree of foreclosure, to the assignor, on receiving payment in full from the latter.]

Executors and administrators are fully within the application of these principles; being considered in equity as trustees for creditors, legatees, distributees and heirs, and in that character disabled from purchasing at sales of either lands or chattels under a power in the will or a power derived from the court; for as they always have a power and duty to sell lands under authority of the court, so far as may be necessary for the payment of debts, their trust, in its nature, embraces an administration of both classes of property, and by virtue of their powers and duties in respect to both the lands and the personalty, they are, substantially, trustees, and therefore

disabled from purchasing for their own benefit and to the loss of those for whom they are entrusted. A purchase, therefore, direct or indirect, entire or partial, by one or more executors or administrators, at their own sale, whether by a power in the will or under an order of court, will always be set aside on application of any of the heirs, or any of the unsatisfied creditors, or other persons interested; *Davoue v. Fanning*; *Rogers v. Rogers*; *Ward v. Smith*, 3 Sandford, 592, 596; *Michoud et al. v. Girod et al.*, 4 Howard, 504, 554; *Harrington v. Brown*, 5 Pickering, 519, 521; *Litchfield v. Cudworth*, 15 Id. 24, 31; *Shelton v. Homer and others*, 5 Metcalf, 462, 467; *Fleming v. Faron*, 12 Georgia, 544; *Lessee of Moody et al. v. Vandyke et al.*, 4 Binney, 31, 43; *Painter v. Henderson*, 7 Barr, 48, 50; *Musselman v. Eshelman*, 10 Id. 394; *Price v. Morris*, 5 McLean, 4; *Price v. Gamble*, 1 Stockton, 218; *Shuman's Appeal*, 3 Casey, 64; *Johnson v. Blackman*, 11 Conn. 343, 357; *Green v. Sergeant*, 23 Vermont, 466; *Arrow-smith & Wife v. Van Harlingen's Ex'ors*, Coxe, 26; *Den ex Dem. Obert v. Hammel*, 3 Harrison, 74, 81; *Den v. Wright*, 2 Halsted, 175; *Den v. McKnight*, 6 Id. 385; *Davis v. Simpson*, 5 Harris & Johnson, 147; *Ryden v. Jones*, 1 Hawks, 497, 504; *Gordon v. Finlay*, 3 Id. 239, 242; *Brackenridge v. Holland*, 2 Blackford, 377, 380; *Cox's Heirs v. Cox and Talbert*, Peck, 443, 450; *Thorpe et al. v. McCullum et al.*, 1 Gilman, 615, 625; *Scott v. Gamble*, 1 Stockton's Ch. 235; *Mulford v. Bowen*, Id. 797; *Doe v. Harvey*, 3 Indiana, 104; and the same disability is applied to an agent of an administrator purchasing for himself at an administra-

tor's sale; *Buckles v. Laferty's Legatees*, 2 Robinson, 294, 300. [And when a purchaser at a sale of this description, reconveys the property, within a short time afterwards, to the trustee or executor by whom it was sold, he will be presumed to have been put forward as a mere tool or cover, and the deed will be set aside on the ground of collusion; *Obert v. Obert*, 2 Stockton's Ch. 98. The mere circumstance, however, that the purchaser of the real estate of a testator is an executor under the will, will not invalidate the purchase, because the real estate, *prima facie*, lies beyond the trust; although the case will be different if the executor has funds to pay the debt for which the sale is made; *Meanor v. Hamilton*, 3 Casey, 137.]

Some earlier cases in Kentucky and Virginia which threw doubts upon the application of the rule to executors and administrators, are now entirely overruled, at least in regard to sales of real estate; *Grider v. Payne*, 9 Dana, 188, 190; *Moore v. Hilton et al.*, 12 Leigh, 2, 28; *Bailey's Adm'r v. Robinsons*, 1 Grattan, 4, 9. In South Carolina, however, after much variation in the cases, the latest decision of the Court of Appeals appears to be, that an executor or administrator is not, in regard to personal estate, to be regarded as a mere trustee to sell, and that a purchase of chattels by them at their own sale, if fairly made and for full value, is good; *Stallings and Wife v. Freman, Adm'r*, 2 Hill's Chancery, 401, 409, where the cases are collected; but see also *Britton and Wife v. Johnson*, Id. 430, 434; and *Crispin v. Taylor*, Id. 434, note. And the rule is the same in North Carolina; *Lyon v. Lyon*, 8 Iredell,

Eq. 201. In Alabama, also, it is held, that an executor or administrator may purchase at his own sale, provided it be fairly and for full value; *Brannan et al. v. Oliver*, 2 Stewart, 47; *Saltmarsh v. Beene*, 4 Porter, 283, 295; *Julian et al. v. Reynolds et al.*, 8 Alabama, 680, 683; but this seems to have been applied only to personal estate. And the existence of this exception to the general rule, that a trustee cannot purchase at his own sale, is regretted, and declared to rest only on authority and precedent, in *McCartney et als. v. Calhoun et al.*, 17 Id. 301, 203. See, also, *Lovell v. Briggs*, 2 New Hampshire, 218, 221. An administrator may sell the goods of his intestate at private sale, and may repurchase them; but such a transaction would not be sustained unless obviously free from all suspicion of fraud; *Johnson et als. v. Kay, Adm'r*, 8 Humphreys, 142. "It is a well established principle of equity," said the court in that case, "that an executor or administrator, will not be permitted under any circumstances, to derive a personal benefit from the manner in which he transacts the business, or manages the assets of the estate. Any profit thus derived, is considered as so much increase of the trust fund in his hands, and as belonging to the estate."

The same disabling rule applies to guardians: a purchase by a guardian at his own sale, made under an order of the Court, may be set aside by the ward on arriving at full age, as a matter of course, though perfectly fair and for a full price; *Scott et al. v. Free-land*, 7 Smedes & Marshall, 410, 418; *Patton v. Thompson*, 2 Jones, Eq. 285. And it applies to all who hold a situation of trust or confidence in

reference to the subject of the sale; see *Van Epps v. Van Epps*, 9 Paige, 238, 241; to the cashier of a bank, for example, attending a sale under a mortgage from which the bank was equitably bound to protect the complainant's property; in such a case the officer could not be allowed to purchase on his own account, and thereby leave the bank liable to indemnify the complainant; *Torrey v. Bank of Orleans*, 9 Paige, 650, 663; S. C., 7 Hill, 260. In like manner, if one who is employed as an agent to pay taxes on the lands of non-residents, suffer them to be sold for taxes, and buy them himself, he is a trustee for the owners: *Oldhams v. Jones, &c.*, 5 B. Monroe, 458, 467. And, in general, the rule extends to all cases in which confidence has been reposed, and applies as strongly to those who have gratuitously or officiously undertaken the management of another's property, as to those who are engaged for that purpose and paid for it; *Rankin v. Porter*, 7 Watts, 387, 390; *Baker v. Whiting*, 3 Sumner, 475, 483; *Casey v. Casey*, 14 Illinois, 112.

An assignee, or trustee, in an assignment for the benefit of creditors, is also incapacitated from purchasing at his own sale; *Harrison, &c. v. Mock et al.*, 10 Alabama, 185, 194; and an agent of the assignee is equally disabled; *Cram v. Mitchell*, 1 Sandford, 251, 256; *Hammond v. Stanton*, 4 Rhode Island, 65. In *Ex parte Wiggins*, 1 Hill's Chancery, 353, the assignees of a debtor filed a bill against his heirs and creditors to marshal the assets, and the court ordered a sale of real estate by a commissioner, under the superintendence of the assignees. One of the as-

signees bought, and filed this bill to have the sale confirmed: the commissioner reported that the sale was fairly conducted, and the purchase was *bona fide* and for an adequate consideration, and that the purchaser was a creditor of the assignor: but the court decided, that the trustee could not purchase except subject to the option of the parties interested, without any inquiry into circumstances, to have a release, or to hold the trustee to his purchase; and it was accordingly ordered to be inquired if any creditor or other party interested desired a resale, and if so, that the property should be re-sold, but if not, that the sale should be confirmed. In *Wade v. Harper*, 3 Yerger, 383, where a deed of trust for the payment of a creditor was made, authorizing the trustee to sell at the request and option of the creditor, it was held that the creditor could not purchase. "We cannot distinguish the relation of (the creditor) to this transaction," said Catron, Ch. J., "from that of a commissioner of a bankrupt, where the trustee makes the sale of the assets. In such case, the commissioner has a duty to perform, to make the estate bring the best price, and cannot buy without being subject to have the sale set aside at the election of the creditors. In all cases where the property is vested in a trustee, with power to sell, or where there is a power in one to sell, the title remaining in the *cestui que trust*, or the aid of a solicitor is called in, or where there is an agent to aid in effecting the sale, such persons cannot be permitted to buy the property, denuded of the trust, and if any interested, especially the *cestui que trust*, calls in question the purchase, that it was fair, is no defence; the trust at-

tends it." In *Saltmarsh v. Beene*, 4 Porter, 283, the same rule was applied to a commissioner appointed by the Orphans' Court to sell lands, who was held incapable to buy directly or indirectly, in whole or in part.

It is equally settled, that an agent to sell cannot be the purchaser, nor an agent of the purchaser. A sale by an agent to himself is void in law, and if the transaction assumes such a form as to be valid in law, equity will make him a trustee for his principal; see *Teakle v. Bailey*, 2 Brockenbrough, 44, 51; *Banks v. Judah*, 8 Connecticut, 146, 157; *Church v. Marine Insurance Company*, 1 Mason, 341, 344; *Barker v. Marine Insurance Company*, 2 Id. 369; *Copeland v. Mercantile Ins. Co.*, 6 Pickering, 198, 204; *Pensoneace v. Bleakley*, 14 Illinois, 15. So, if a trustee or agent to sell, in a deed, makes a sale in which he is to be at all interested, the transaction may be set aside in equity by the *cestuis que trust*; *Armstrong v. Campbell*, 3 Yerger, 202, 236; *Hunt v. Bass*, 2 Devereux's Equity, 292, 295; and where a mortgagee with power to sell, makes a conveyance to a third person, and immediately takes a re-conveyance to himself, though the value of the premises is not greater than the mortgage debt, the heirs may set aside the sale, as of course; *Dobson v. Racey*, 3 Sandford, 61. And the same thing is applicable to judicial and legal officers. A sheriff selling land on execution cannot be a purchaser directly, or through the medium of a third person, who purchases in secret trust for him; *Lessee of Lazarus v. Bryson*, 3 Binney, 54, 58; *Carter, &c. v. Harris*, 4 Randolph, 199, 204. An attorney in the execution is also incapable of purchas-

ing for himself, against his client's will, unless for a price sufficient to cover the client's demand; *Moore v. Moore*, 4 Sandford's Ch. 37; 1 Selden, 256; and if an attorney acts for two or more clients, and buys for one, the others have an equity to claim the equal benefit of the purchase: *Leisenring v. Black*, 5 Watts, 303, 305; *Hawley v. Cramer*, 4 Cowen, 719, 739: and see *Howell v. Baker*, 4 Johnson's Chancery, 118, 120; and this disability reaches all who take part officially in the process of sale, even in the preliminary steps that precede it; and it has therefore been held that an appraiser of the property for an administrator's sale, cannot purchase at the sale; *Armstrong v. Huston's Heirs*, 8 Ohio, 552. There is no objection, however, to a purchase by a mortgagee, or creditor, under an execution issued by him or others; *Lyon v. Jones*, 6 Humphreys, 533; *Murdock's case*, 2 Bland, 461, 468.

[The rule is a general one, and will apply not merely in those cases when the trust or confidence is absolutely violated, but when the circumstances are such that there would, or might, be a temptation to violate it: *Moore v. Moore*, 4 Sandford, Ch. 37; 1 Selden, 256. Hence, an agent or attorney employed to collect a debt, cannot buy the property of the debtor at a sale, under an execution issued in the course of the agency, for less than the amount of the debt; because, his interest as buyer might induce him to force a sale to the injury of his principal: *Ib.* The result will be the same, where an agent, employed to obtain information with a view to a purchase, misapplies what he learns, by buying for his own benefit; *Reid v. Stanley*, 6 W. & S. 376; or when

one duly authorized to make insurances, or to execute policies on behalf of an insurance company, insures his own property, without the express sanction of his principals, thus bringing his interest in direct conflict with their's, on points on which he was bound to exercise his judgment solely for their benefit: *Bentley v. The Columbia Ins. Co.*, 19 Barbour, 595.]

Where a person stands in the situation of a trustee for others, and bound as such to protect the general interests of those for whose benefit the trust was created, in regard to the subject of the sale, he is equally incapacitated from purchasing for his own benefit, at a sale under an adverse proceeding, and at a judicial sale, as at his own sale, under his powers as trustee. The reason is obvious; as general trustee of the subject, it is his duty to make it bring as much as possible, at any sale that may take place; and therefore he cannot put himself in a situation where it becomes his interest that the property should bring the least sum. In *Chapin v. Weed and others*, 1 Clarke's Chancery, 464, the assignee of all a debtor's property under a general assignment in trust for the payment of debts, bought a part of the trust property at a master's sale under a previous mortgage: but it was decided that the creditors had a right to the purchase, the assignee being a trustee for them, and that although the sale was a judicial one, and there was no pretence of collusion or connivance by the assignee to procure the sale, and the sale was public, and there was no contrivance to prevent persons from bidding, still, without a special authority from the court, the trustee could not become a purchaser for his own benefit: "The rule in re-

lation to all classes of trustees," said the court, "is well settled. A trustee cannot purchase or be interested in the purchase of the trust estate, or any part thereof. He cannot derive any private advantage from the sale of the trust property committed to his guardianship; and all the advantages which he does thus acquire, shall result to the benefit of the *cestui que trust*." In *Campbell v. Johnson and others*, 1 Sandford, 148, a testator appointed two persons his executors, and the guardians of his children, and devised all his estate to them in trust to sell for the benefit of his heirs. The land was subject to mortgages given by the testator, and under one of them it was sold, and one of the executors purchased. The court held that the sale must be set aside on the application of the heirs, upon the ground, that in both capacities, as trustees to sell and as guardians of the children, the executors had a duty to perform in regard to the property, which rendered it inequitable for either of them to become a purchaser.

In *M^cGinn v. Shaeffer*, 7 Watts, 412, 415, also, it was held that a trustee for an infant, suffering the property to be sold under incumbrances, and buying it in, is a trustee for the infant. In *Callis & Semmes v. Ridout & Ringgold*, 7 Gill & Johnson, 2, 7, commissioners had been appointed to hold and sell lands for certain purposes, and one of them bought a part of the land under an adverse judgment; it was held that this could not enure to his own benefit, but must be applied to the objects of the trust, after re-imbursing to him the amount of his purchase-money and all proper and necessary expenses. In *Bell et al. v. Webb & Mong*, 2 Gill, 164, 170, a

trustee in a deed of trust to sell for the payment of debts, purchased, through his agent, at a sheriff's sale, a part of the property. "One of the questions which arises in this case," said the court, "is, whether a trustee can be permitted to purchase the *cestui que trust's* property, levied upon and sold at a sheriff's sale, without any instrumentality of his:" and upon the authority of the preceding case, it was decided that the *cestui que trust* was entitled to the benefit of the purchase, though the trustee had a just claim to be reimbursed for his expenditures in the purchase. In *Evertson v. Tappen*, 5 Johnson's Chancery, 498, 514, it was held that an executrix who was the widow of the testator and the natural guardian of his children, could not buy the property for herself at a sale under a mortgage given by the testator in his lifetime; *Torrey v. Bank of Orleans*, 9 Paige, 650, 663; S. C.; affirmed, 7 Hill, 260, establishes the same point. In *Van Epps v. Van Epps*, 9 Paige, 238, 241, a person who held a second mortgage in trust for third parties, bought in the premises for himself at a sale under the first mortgage, for a sum insufficient to satisfy both mortgages. "The defendant," said the Chancellor, "is wrong in supposing that he was authorized to become the purchaser of the farm, under the master's sale upon the prior mortgage, for his own exclusive benefit, to the prejudice of the subsequent mortgage, which he held in trust for others. The duty of the trustee, as the holder of the junior mortgage, was to make the mortgaged premises, if possible, produce upon the sale sufficient not only to pay off the prior incumbrance, and the costs of foreclosure, but also to satisfy the sub-

sequent incumbrance which he held in his fiduciary character; and this duty came directly in conflict with his interest, as a purchaser for his own benefit, to bid in the property at the lowest sum for which he could obtain it.

Against this clear application of a safe and conservative principle of equity, two American cases stand opposed; *Prevost v. Gratz*, 1 Peters' C. C. 365, 378, where Washington, J., said that a purchase by a trustee or executor at a sheriff's sale was not prohibited; and *Fisk v. Sarber*, 6 Watts & Sergeant, 18, where it was held (Rogers, J., dissenting,) that the assignee of an insolvent debtor might purchase at a sale under a mortgage existing previously to the mortgage. The reasoning of Kennedy, J., in this case, is wholly unsound, and proceeds upon the error of overlooking the former of the two principles stated in the beginning of this note; as distinguished from the latter of them: the accurate view of the law upon the subject then before the court is to be found in the dissenting opinion of Rogers, J. See *Cadbury v. Duval*, 10 Barr, 265, 272.

It is admitted, however, in all the cases, that a trustee may purchase by consent of the Court of Chancery, to be obtained by his filing a bill and showing the circumstances, and making out a sufficient case; see *Davoue v. Fanning*, 2 Johnson's Chancery, 252, 261, 262; *Dobson v. Racey*, 3 Sandford, 61; *Brackenridge v. Holland*, 2 Blackford, 377, 381; but the court, upon such an application, will always require such facts to be shown as justify a departure from the general rule. Where it is made to appear that the trustee has a personal interest in procuring a fair price for the pro-

perty, which interest would probably be sacrificed if he were not permitted to bid, it is very much a matter of course to give him leave to purchase; and if it be his own sale, a master or another trustee will be substituted for the execution of the trust: but even in these cases, the court must always be satisfied that the interest of the *cestui que trust* will not suffer by the permission, and if the trustee, from his connexion with the property, has had superior advantages of information as to its situation and value, so that he will not come to the sale on terms of equality with other bidders, the court will not put him in a position which will make it for his interest to keep that information to himself; but will require him to obtain the consent of all the *cestuis que trust*; *De Caters v. Le Ray De Chaumont*, 3 Paige, 178.

A purchase by a trustee is not absolutely void; it is voidable only by the *cestuis que trust*, in equity, and then only upon certain terms: it is valid in equity as well as at law, unless some of them choose thus to avoid it; *Thorp et al. v. Cullum et al.*, 1 Gilman, 615, 627. [And hence, the only remedy for those who are, or conceive themselves to be injured, is in chancery, which can bring all the parties before it, and do justice to all by a single decree; *Davoue v. Fanning*, 2 Johnson's Ch. 252; *Doe v. Henry*, 3 Indiana, 104; although a different view has been taken in New Jersey, and such sales held equally invalid at law and in equity; 1 Stockton, Ch. 218.] Such sales will not, however, be set aside, either by law or equity, on the application of the trustee, or of an agent who bids for him, for the rule was not adopted in favor of trustees,

but for the protection of the *cestui que trust*; *Richardson v. Jones*, 3 Gill and Johnson, 164, 184; though it was held in *Saltmarsh v. Beene*, 4 Porter, 283, that an agreement between a trustee and an agent that the latter shall purchase for him is so far unlawful that the trustee cannot enforce it; but seems hardly to be correct. No persons, but the *cestuis que trust*, that is, the persons interested in the property or in the sale of it, can apply to be relieved against the purchase by the trustee; and a stranger cannot avoid the sale; *Jackson v. Van Dalfsen*, 5 Johnson, 43, 48; *Jackson v. Walsh*, 14 Id. 407, 415; *Wilson v. Troup*, 2 Cowen, 196, 238; *Hawley v. Cramer*, 4 Id. 719, 744; and any one of the *cestuis que trust* may apply, though a majority are content with the sale; *Davoue v. Fanning*, 2 Johnson's Chancery, 252, 268. The equity of the *cestuis que trust* is, to have the option of confirming the purchase and holding the trustee to it, or of setting it aside, and having the property re-sold; *Jennison v. Hapgood*, 7 Pickering, 1; S. C., 10 Id. 79, 111; see *Prevost v. Gratz*, 1 Peter's C. C. 365, 368; *Hyndman v. Hyndman*, 19 Vermont, 10, 13. They may elect to confirm it, and if they do so, deliberately, with full knowledge, neither they themselves afterwards, nor their legal representatives, nor a stranger, can object to it; *Lessee of Lazarus v. Bryson*, 3 Binney, 54, 58; *Painter v. Henderson*, 7 Barr, 48, 50; *Musselman v. Eshleman*, 10 Id. 394; *Harrington v. Brown*, 5 Pickering, 519, 521; *Moore v. Hilton et al.*, 12 Leigh, 2, 28; *William's Ex'rs v. Marshall*, 4 Gill & Johnson, 377, 379; *Field v. Arrowsmith*, 3 Humphreys, 442, 446;

Scott et al. v. Freeland, 7 Smedes & Marshall, 410, 419, 420; although the information must be full and complete to give validity to the election; *Andrews v. Holson*, 25 Alabama, 219. If the property has been re-sold by the trustee to a *bona fide* purchaser without notice, before the *cestui que trust* applies to the court, the original sale cannot be set aside, and the remedy will be only personal against the trustee for an account of the profit, if he made any; *Lessee of Lazarus v. Bryson*; *Jackson v. Walsh*; *Hawley v. Cramer*; *Robbins v. Bates*, 4 Cushing, 104; but if a conveyance is made by two administrators or other trustees, to one of themselves, the heirs may set aside the sale, even in the hands of a purchaser for value, for he has notice upon the face of the title; *Ward v. Smith*, 3 Sandford, 592, 596. And even where the property has not been alienated, the *cestui que trust* must apply to chancery, within a reasonable time after he has knowledge of the facts which impeach the sale, or he will be presumed to have acquiesced; and reasonable time depends upon the circumstances of the case, and the sound discretion of the court; under some circumstances, sixteen years have been held to constitute *laches*, and under others, twenty-seven years have been held to be too long a delay; see *Bergen and another v. Bennett*, 1 Caines's Cases, 1, 20; *Hawley v. Cramer*, 4 Cowen, 719, 743; *Dobson v. Racey*, 3 Sandford, 61; *Ward v. Smith*, 3 Id. 592, 596; *Bell et al. v. Webb and Mong*, 2 Gill, 164, 170. Independently of circumstances, equity usually adopts as a bar to the assertion of such a trust the period which bars a title at law; but circumstances may always

be considered either to shorten or lengthen the time; in the late case of *Michoud et al. v. Girod et al.*, 4 Howard, 504, 661, it was said that where there is actual fraud, no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it. In the later case of *Bowen v. Evans*, House of Lords' Cases, 257, 282, the Lord Chancellor (Cottenham) stated the principle as follows, in regard to the setting aside of remote transactions on the ground of fraud: "When much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud: although upon fraud clearly established, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the effects of their plunder."

When a *cestui que trust* objects to a purchase by a trustee, the trustee is not to be called upon to make up the difference between what he paid, and what was the true or probable value at the time; the ordinary relief consists in ordering a re-sale upon such terms as fully secure to the trustee all that he has expended; *Mason v. Martin*, 4 Maryland, 124. The court in ordering a re-sale, will direct an account to be taken, in which the purchaser will be credited with the purchase-money which he has paid, and interest, and with the cost of all valuable improvements made upon the land

since the purchase, and will be charged with the profits of the land, or a fair annual rent instead; the balance of this account with the commissions and charges of re-sale is to be the price at which the land is to be set up at the resale; if no more is bid than the upset price, the former purchase stands confirmed; but if more is bid, the former purchase is vacated, and a new conveyance ordered to be made to the purchaser at the resale, and the proceeds are applied first to pay the expenses of the sale, and then to pay the trustee the balance expended by him for the purchase-money and improvements, and the surplus is decreed to the *cestuis que trust*; *Buckles v. Laferty's Legatees*, 2 Robertson's Virginia, 294, 301; *Bailey's Adm'x v. Robinson*, 1 Grattan, 4, 9; *Davoue v. Fanning*, 2 Johnson's Chancery, 252, 271; *Hawley v. Cramer*, 4 Cowen, 719, 744; *Ex parte Wiggins*, 1 Hill's Chancery, 353, 355; *Crispin v. Taylor*, 2 Id. 434, 436, note; *Scott et al. v. Freeland*, 7 Smedes and Marshall, 410; *Spuseler v. Atkinson*, 3 Maryland, 409; *Mason v. Martin*, 4 Id. 124; but the court may in its discretion set aside the sale entirely, if necessary, and order the purchase-money to be refunded; *Scott et al. v. Freeland*; *Campbell v. Johnson and others*, 1 Sandford, 148, 152. Where there has been actual, conscious fraud, a trustee would probably not be allowed for the value or cost of improvements. If the trustee has sold the property before the bill is filed, he will be compelled to account for the profits; and if by his own conduct it has become impossible to ascertain with exactness what profit was made, he will be charged with the largest amount that the case will reasonably

admit of; *Brackenridge v. Holland*, 2 Blackford, 377, 383.

A trustee is not under an absolute disability to purchase the trust property from his *cestui que trust*: *Spindler v. Atkinson*, 3 Maryland, 409; but all such transactions are scanned in a court of equity with the most searching and questioning suspicion; and will not be sustained unless they fully appear to have been in all respects, fair and candid and reasonable. The trustee must show that he took no advantage whatever of his situation; that he gave to his *cestui que trust* all the information which he possessed or could obtain, upon the subject; that he advised him, as he would have done in relation to a third person offering to become a purchaser; and that the price was fair and adequate: and the onus of proving all this is upon the trustee. And these principles apply to all cases where confidence is reposed; to agents, attorneys, solicitors, guardians, &c. See *Butler et al. v. Haskell*, 4 Dessausure, 652, 705; *McCants and wife v. Bee and others*, 1 M'Cord's Chancery, 383, 389; *Farr v. Farr*, *Ex'or*, 1 Hill's Chancery, 387, 390; *Hawley v. Cramer*, 4 Cowen, 719, 740; *Bolton v. Gardner*, 3 Paige, 274, 279; *Poillon v. Martin*, 1 Sandford, 569, 572; *Stuart v. Kissingam*, 2 Barbour, 494, 505; *Boyd v. Hawkins*, 2 Devereux's Equity, 195, 208, 329, 330; *Adm'r of Spence v. Whitaker et al.*, 3 Porter, 297, 325; *Kennedy's Heirs and Executors v. Kennedy's Heirs*, 2 Alabama, 574, 606; *Johnson v. Johnson*, 5 Id. 91, 95; *Farnham v. Brooks*, 9 Pickering, 214, 231; *Brook et al. v. Berry*, 2 Gill, 84; (see *Greenfield's Estate*, 2 Harris, 489, 506;) to every one, in short, who has entered into a fiduciary

relation or assumed an obligation by contract or otherwise towards another which it would be a breach of trust and confidence to violate; and hence, when A. agreed for a valuable consideration, to furnish B. with the information necessary for the entering of public land in his own name, and afterwards took up the same land himself in fraud of the agreement, equity decreed a trust in favor of B.; *Winn v. Dillon*, 27 Mississippi, 494.

[It has been said, and there is a great weight of authority for the position, that a purchase by an agent cannot, in itself, and without special circumstances, give rise to a trust in favor of the principal, consistently with the provisions of the Statute of Frauds, unless the agency is proved by written evidence, or admitted by the agent; *Bartlett v. Pickersgill*, 1 Eden, 515; 4 East, 577, note b.; *Peebles v. Reading*, 8 S. & R. 484, 492; *Kisler v. Kisler*, 2 Watts, 322; *Walker v. Bringham*, 13 Smedes & Marshall, 723, 765; *Schmidt v. Gatewood*, 2 Richardson's Eq. 162; *Wallace v. Brown*, 2 Stockton's Ch. 308; 2 Story's Eq. 1201; and the same rule has been held to apply, when a defendant, who has agreed verbally to purchase for the joint account of himself and another, effects the purchase, and takes a deed solely for his own benefit; *Atkins v. Rowc*, Mosely, 133; *Flagg v. Mann*, 2 Sumner, 488, 546; *Smith v. Burnham*, 3 Id. 435, 463. There can, however, be no doubt, that the law will raise a trust in every instance, where one who is confessedly an agent, buys in fraud of the agency, or of the duties which it imposes, *ante*; *Henry v. Raiman*, 1 Casey, 354; *Church v. Sterling*, 16 Conn. 388, 401; and the better opinion would seem to be, that

facts which, if proved, would give rise to a trust by construction or operation of law, in the general sense in which law includes equity, may be proved orally without violating the Statute of Frauds; *Jenkins v. Eldridge*, 3 Story, 181, 290. •

Implied trusts are excepted by the express words of the statute, and the exception would manifestly be inoperative, if it were necessary to give written evidence of the facts which gave birth to the implication. Hence, whenever the circumstances under which a purchase is made by an agent, are such that an implied trust would arise if they were proved or admitted, the means of proof will be immaterial, and the testimony of witnesses equally good with the most formal writing.

There are, accordingly, a number of instances in which a trust has been decreed in favor of a principal, without adverting to whether the authority of the agent was oral or written; *Taylor v. Salmon*, 4 Mylne and Craig, 134; *Church v. Sterling*, 16 Conn. 388; *Morey v. Herrick*, 6 Harris, 125; *Rankin v. Porter*, 7 Watts, 387; *Parkist v. Alexander*, 1 Johnson's Ch. 394; *Rogers v. Ross*, 4 Id. 118; *Sweet v. Jacocks*, 6 Paige, 364; *The Bank of Orleans v. Torrey*, 9 Id. 653, 7 Hill, 360; *Piatt v. Oliver*, 3 Howard, 353; *Copeland v. The Mercantile Ins. Co.*, 6 Pick. 198; *Moore v. Moore*, 4 Sandford's Ch. 1; 1 Selden, 256; *Pennsonneau v. Bleakley*, 14 Illinois, 15; and there can be little doubt that this result will follow, whenever the conduct of the agent is tainted by actual fraud, whether the agency is proved by written or unwritten evidence; *Brown v. Lynch*, 1 Paige, 347; *Sweet v. Jacocks*, 6 Id. 364; *Lees v. Nuttall*, 1 Tamlyn, 282,

2 Mylne & Keene, 819; *Cloninger v. Summit*, 2 Jones' Eq. 513; *Hargrave v. Ring*, 5 Iredell, Eq. 430; *Mosely v. Lane*, 27 Alabama, 62; *Edmonson v. Welsh*, Id. 578; *Reid v. Stanley*, 6 W. & S. 369; *Myers' Appeal*, 2 Barr, 463; *Baker v. Whiting*, 3 Sumner, 475, 483; *Brown v. Dysinger*, 1 Rawle, 408. Thus, no court would permit an agent employed to protect land sold at a sale for taxes, or under a compulsory legal process of any sort, by bidding for it on behalf of the owner, to make the purchase in his own name and then refuse to give it up to the principal, on the ground that his authority was merely oral, and that there was no written proof of the confidence which he had abused. A trust will also be decreed when an agent, by professing to bid for his principal, obtains the property for less than he would have had to give had he been known to be buying for himself; *Kisler v. Kisler*, 2 Watts, 323; *McDonald v. May*; *Peebles v. Reading*; *Brown v. Dysinger*; *Brown v. Lynch*. Some of the cases might, indeed, give the impression that this course should be restricted to purchases at public sales, where a trust should, it has been said, be decreed from motives of public policy, and to prevent the repetition of a course injurious to the community; *Kennard v. Harris*, 3 Richardson's Eq. 423; *Cox v. Cox*, 5 Id. 365; *McDonald v. May*, 1 Id. 91; *Lloyd v. Currin*, 3 Humphreys, 462. The better opinion, however, would seem to be, that the nature of the sale should make no difference, and that a trust will arise wherever there has been a violation of confidence on one side, and an injury inflicted by it on the other. Whenever, therefore, the question whether

an agent commissioned orally to obtain a conveyance or lease for the benefit of his principal, can hold the land under a deed taken in his own name, in fraud of the agency, shall be formally brought forward, it will probably be determined without difficulty in favor of the principal; *Jenkins v. Eldridge*, Story, 181, 293; *Cloninger v. Summit*, 2 Jones' Eq. 513; *Hargrave v. King*, 5 Iredell, Eq. 430. "When one," said the court in *Hargrave v. King*, "by parol agrees to procure a lease for himself and others, and procures that lease in his own name, he is a trustee for those for whom he agreed to act, and the statute has no application." The trust in all these cases, however, springs from the fraud, and cannot grow out of the violation of an oral agreement, unless fraud be present; *Schmidt v. Gatewood*, 2 Richardson's Eq. 162; *Jackman v. Ringland*, 4 W. & S. 149; *Sharp v. Long*, 4 Casey, 434. Hence, in order to call a trust of this description into being, the wrong must be contemporaneous with the purchase, and must consist in the fraudulent substitution of the name of the agent in the conveyance, for that of the principal; for when the agent is expressly or impliedly authorized to take the deed in his own name, in reliance upon a promise or agreement that the purchase shall enure or be held subsequently for the benefit of the principal, the latter must submit to the consequences of his ill-placed confidence, and no trust can be raised without disregarding the plain import of the Statute of Frauds; *Pen-*

nock v. Clough, 16 Vermont, 507; *Lathrop v. Hoyt*, 7 Barbour, 69; *Blair v. Bass*, 4 Blackford, 539; *Wallace v. Brown*, 2 Stockton's Ch. 308. The distinction is plain between getting a title in fraud of the agency, and keeping it contrary to an agreement that it shall be conveyed; and will, perhaps, serve to reconcile most if not all of the decisions, in which written evidence of the agency has been said to be necessary to constitute a trust.

Trusts arising under the circumstances specified in this note, and in that to *Keech v. Sandford*, *ante*, and in general all trusts which are fastened by equity on the conscience of the holder of the legal title, to compel the surrender of that which he acquired or seeks to retain in his own wrong, without regard to or irrespectively of the intention, have been described as constructive trusts, or trusts by construction of equity, while those which arise from the presumed meaning or intention of the parties, as when the consideration for the purchase is paid by one man, and the deed taken in the name of another, are ranged under the head of resulting or presumptive trusts; Hill on Trustees, 91, 144, *post*, note to *Dyer v. Dyer*. Both are, however, due to a legal or rather equitable implication, and both fall, alike, under the proviso which excepts trusts arising or resulting by implication or construction of law, from the operation of the statute: the word law being used in the general sense in which law includes equity.]

REAL ESTATE OF PARTNERSHIP.

*LAKE v. GIBSON.

[*143]

TRIN. TERM, 1729.

REPORTED 1 EQ. CAS. AB. 294, PL. 3.

JOINT PURCHASERS.]— *Where several persons make a joint purchase for the purposes of a joint undertaking or partnership, either in trade or any other dealing, although they are joint-tenants at law, in equity they will be considered as tenants in common, and the survivors as trustees for those who are dead.*

THE Commissioners of Sewers had sold and conveyed lands to five persons and their heirs, who afterwards, in order to improve and cultivate those lands, entered into articles whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum to be laid out in the manurance and improvement of the land.

SIR JOSEPH JEKYLL, M. R., held that they were tenants in common, and not joint tenants, as to the *beneficial interest* or *right* in those lands, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole estate.

And his Honor held, that when two or more purchase lands, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, that this is a joint-tenancy; that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other: but where the proportions of the money are *not equal*, and this appears in the deed itself, this makes them *in the nature of partners*; and [*144] *however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them.

So, if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

[*145]

*LAKE v. CRADDOCK.

(On an Appeal from the Decree at the Rolls in LAKE v. GIBSON.)

DE TERM. S. MICHAELIS, 1732.

REPORTED 3 P. WMS. 158.

JOINT PURCHASERS.]—*Five persons purchased West Thorock Level from the Commissioners of Sewers, and the purchase was to them as joint tenants in fee; but they contributed rateably to the purchase, which was with an intent to drain the Level; after which several of them died. They were held to be tenants in common in equity; and though one of these five undertakers deserted the partnership for thirty years, yet he was let in afterwards, and on what terms.*

THE case was thus: Great part of the lands in West Thorock, in Essex, having been overflowed by the river Thames, near Dagenham, and the land-owners not thinking it worth their while to pay the assessments made on them by the Commissioners of Sewers, the commissioners decreed the lands to be forfeited, and conveyed them to three trustees in trust to sell, and raise money for the draining of these overflowed lands.

The defendant Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the level or overflowed lands of West Thorock, the trustees for the sale, by the consent and direction of the Commissioners of Sewers, did, by deed, indented and enrolled, dated the 8th day of February, 1695, in consideration of 5145*l.* paid to the Commissioners by the five purchasers, convey this level to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several [*146] sums of money were *expended in carrying on the undertaking; and in 1699, the defendant Craddock's father paid his last contribution, which, with what he had advanced before, came in all to 1025*l.*

Afterwards, it seeming to be an enterprise which would prove very expensive, and there being some uncertainty as to the success of it, the defendant Craddock's father wholly deserted it, and never more concerned himself therewith.

The four other undertakers were advised that some neighboring lands would be of service to their design; upon which, in April, 1703, they purchased the manor of Porretshells, in West Thorock, of the Lady Smith, for 2550*l.*, and in February following purchased the moiety of the rectory and tithes of West Thorock for 1400*l.* of Sir Charles Tyrrell; which two purchases were thought useful in the undertaking, and were made in the names of the four undertakers, omitting Craddock; nor did it appear that he was ever consulted therein, or desired to contribute to the purchase. Craddock, the father, died, leaving the defendant Craddock, the son, his *heir* and *executor*.

The plaintiff, Sir Bibye Lake, one of the original partners, brought this bill

against the rest of the partners, or their representatives, for an account and division of the partnership estate. And on the first coming on of the cause, at the Rolls, his Honor referred it to the Master to state a case between the parties, for the judgment of the Court. And the Master having made his report, the cause was thereupon heard, when the principal, or rather the only question was, whether these five purchasers having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity?

Sir Joseph Jekyll, M. R., on debate, decreed that the survivorship should not take place; for that the payment of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandising,¹ when the *jus accrescendi* is never allowed; that, supposing one of the partners had laid out the whole of the money, and had *happened to die first, according to the contrary construction, he [*147] must have lost all, which would have been most unjust.² Wherefore, it was decreed that these five purchasers were tenants in common, not only as to the level lands which were first purchased, but also with respect to the lands bought afterwards by the four undertakers of the Lady Smith and Sir Charles Tyrrell; but that the defendant Craddock ought not to have the benefit of this tenancy in common, unless he would pay so much money as would make up what had been already advanced by his father equal to what had been contributed by each of the other partners, together with interest for the same from the respective times that Craddock, the father, ought to have made those payments; and on the defendant Craddock's paying the same, then all the said lands to be divided into five parts, the defendant Craddock to have one-fifth; but, on default of payment, the defendant Craddock to be excluded, and the lands to be divided and distributed into four parts among the four other partners.

From this decree the defendant Craddock appealed to the Lord Chancellor King, insisting, that he ought either to receive back the 1025*l.*, which it was admitted his father expended in this undertaking, or to be allowed to come in for a share of the level only, and not to be bound to contribute towards the two purchases made by the four other undertakers of the Lady Smith and Sir Charles Tyrrell: that the four other undertakers had chosen to make these two purchases in their own names only, by which they seemed to have excluded Craddock from all concern therein, and of which, had it proved never so beneficial, he would have had no means of forcing them to admit him to a share; and, therefore, now that it had turned out a losing bargain, there could be no reason to compel him to bear a proportion of the loss. Besides, there was nothing in the articles empowering the partners, or the major part of them, to buy lands; and, by the same reason that they would oblige Craddock to pay his share towards these purchases, they might, if they had fancied [*148] *buying half the country, have compelled him to contribute to that also. That it was difficult to conceive how the uplands thus purchased, much

¹ 1 Inst. 182; 1 Vern. 217; 2 Lev. 188, 228.

² See 9 Ves. 549; Dale v. Hamilton, 5 Hare, 385.

less the tithes, could be of any use in the undertaking ; though, as to the charge of draining the level, exclusive of the two purchases, the defendant Craddock was willing to advance his proportion.

It was, moreover, pretended, that the decree was unreasonable, on account of its having directed that the defendant Craddock, in order to be admitted to one-fifth, should pay not only his proportion of these two purchases, but also of the interest of the purchase-money, from the time that his father ought to have made these payments : whereas the direction ought to have been, that an account should be taken of the profits of these two purchases, which profits might have amounted to as much as the interest, or, if not to quite so much, yet that the defendant Craddock ought to pay no more towards such interest than the deficiency of the quantum of the profits would come to.

To which it was answered by Mr. Solicitor Talbot, that as the defendant Craddock's father and himself had for so long a time (near thirty years) relinquished and abandoned the partnership, and in regard the defendant Craddock had no manner of right thereto but through the indulgence of a court of equity (it being, by law, a joint-tenancy, and, as such, belonging to the survivors,) it was a favorable decree to let him in upon any terms ; and surely the terms now offered him must appear reasonable, viz., that he should, upon his contributing to all the expenses that had been contracted and incurred by reason of any purchases or otherwise, in the prosecution of the undertaking, be admitted to one-fifth of the partnership ; that, had the defendant Craddock brought his bill for the benefit of such undertaking, he could not have hoped to succeed on any other conditions ; that it was still stronger against him, in that he now seemed to decline meddling with the undertaking, so that here was rather great favor shown him than any hardship imposed : that he was [*149] not absolutely and at all events bound by this *decree to pay his proportion towards the new purchases, but had it in his election whether he would do it or no : that as to the interest which was required of him previous to his being admitted into the partnership, it was reasonable he should pay it for his default in not having contributed his share of the principal before, which if he had done, he would not have been charged with the interest ; and this was some disadvantage to the other four partners, who had been deprived of their arrear of interest for near thirty-five years : that, in truth, the design of the defendant Craddock appeared to be to delay matters, and to defer the bringing in of his money and interest till such time as this long account of the profits should be taken, which would require many years ; and that, if the defendant's share of the profits of these two purchases should exceed his proportion of the interest, the surplus, on the making up of the accounts, must be paid him.

For these reasons, the decree of the Master of the Rolls was affirmed.

LORD CHANCELLOR KING¹ said, that this was plainly a tenancy in common

¹ This judgment is from Sugd. V. & P. 903, 11th edit., and is there stated to have been taken from unprinted MS.

in equity, though otherwise at law; and the defendant Craddock having only a title in equity, that he must do equity, and that this was equitable in all its branches; for he had his election to drop all claim, or to take it on the same foot with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election.

It is an invariable rule at law, that, when purchasers take a conveyance to themselves and their heirs, they will be joint tenants: and, upon the death of one of them, the estate will go to the survivor. See Litt. s. 280.

The same rule prevails in equity, except where circumstances exist from which the rule of law is controlled by the presumed intention of the parties. Thus, as is laid down by Sir Joseph Jekyll in *Lake v. Gibson*, where two or more *purchase lands and advance the purchase-money in equal proportions, and take a conveyance to them and their heirs, they will be [*150] held joint tenants in equity as well as at law, upon this principle, that it may be presumed that they intended to purchase jointly the chance of survivorship. The rule of law, therefore, not being repugnant to the presumed intention of the parties, will be followed in equity. See *Taylor v. Fleming*, cited in *York v. Eaton*, Freem. 23; *Rigden v. Vallier*, 3 Atk. 735; S. C., 2 Ves. 258; *Rea v. Williams*, Sugd. V. & P., App. No. xxi., 11th ed. See *Rex v. Williams*, Bunb. 342; *Harris v. Fergusson*, 16 Sim. 308.

Upon the same principle, where persons have entered into a joint contract for the sale of an estate to them and their heirs, and have paid or contracted to pay the purchase-money in equal proportions, a court of equity will not, upon the death of one of them, decree a conveyance to the survivor and the heirs of the deceased purchaser as tenants in common; for if both parties to the contract contribute *equally* towards the purchase-money, the surviving purchaser will be solely entitled to the benefit of the contract, and to have a conveyance of the estate decreed to himself alone. See *Aveling v. Knipe*, 19 Ves. 441, where Sir W. Grant, M. R., observed, that a doubt had been suggested whether a court of equity would in any case execute such an agreement by a conveyance in joint tenancy. "It would not," observed his Honor, "if there were any circumstances from which it could be collected that a joint-tenancy was not in contemplation; but I have no conception that it is of course upon a controversy between two purchasers to depart from the letter of the agreement, and decree them to be tenants in common." And see *Davis v. Symonds*, 1 Cox, 402.

In equity, however, there is a strong leaning against joint-tenancy; and whenever circumstances occur from which it can reasonably be implied that a tenancy in common was intended, a court of equity will hold the survivors of joint purchasers trustees of the legal estate for the representatives of the deceased purchaser.

In *Lake v. Gibson*, Sir Joseph Jekyll lays it down as a general rule, that, where two or more purchase lands and advance the purchase-money in *unequal*

proportions, and this appears on the deed itself, this makes them *in the nature of partners*, and, however the legal estate may survive, yet the survivor will be considered in equity but as a trustee for the other, in proportion to the sums advanced by each of them. See also *Rigden v. Vallier*, 3 Atk. 735; S. C., 2 Ves. 258. The soundness of the distinction between *equal* and [*151] *unequal* advances is doubted by Mr. *Vesey, in a note to *Jackson v. Jackson*, 9 Ves. 597. "If," he observes, "the advance of consideration, generally, will not prevent the legal right, the mere *inequality* of proportion, which may be naturally attributed to the relative value of the lives, ought not to have that effect." Sir Edward Sugden, however, thought the distinction founded on rational grounds. "Where the parties," he observes, "advance the money *equally*, it may fairly be presumed that they purchased with the view to the benefit of survivorship; but where the money is advanced in *unequal* proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed: the *inequality* of proportion can scarcely be attributed to the relative value of the lives, because neither of the parties can be supposed not to know that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint-tenancy by a clandestine act:" Sugd. V. & P. 902, 11th ed. Sed vide *Harris v. Fergusson*, 16 Sim. 308.

Again, where money is advanced by persons, either in *equal* or *unequal* shares, who take a mortgage to themselves jointly, although the debt and security will at law belong to the survivor, in equity there will be a tenancy in common, the survivor being a trustee for the personal representatives of the deceased mortgagees: (*Petty v. Styward*, 1 Ch. Rep. 31, Eq. Ca. Ab. 290; *Rigden v. Vallier*, 2 Ves. 258.) For "equity says it could not be the intention that the interest should survive. Though they take a joint security, each means to lend his own and to take back his own:" Per Lord Alvanley, M. R., in *Morley v. Bird*, 3 Ves. 631.

The personal representatives of the deceased mortgagees are therefore necessary parties to a bill of foreclosure or redemption, (*Vickers v. Cowell*, 1 Beav. 529;) and although the entire legal estate is in the survivor, they are necessary parties to a reconveyance, in order that they may give a valid discharge for their share of the mortgage-money: Carth. 16. Hence it is usual, where trustees advance money on mortgage, to insert a declaration, that, if one of the mortgagees die before the money is paid off, the receipt of the survivor shall be a sufficient discharge; and that the concurrence of the personal representative of the deceased mortgagee shall not be requisite.

If joint mortgagees purchase or foreclose the equity of redemption, they will be held, in equity, tenants in common, "because their intent is presumed to be so:" *Rigden v. Vallier*, 2 Ves. 258. Thus in *Edwards v. Fashion*, Prec. Ch. 332, where the two daughters of a mortgagee for a term of years, taking [*152] under his *will the residue of his personal estate, including the mortgage, equally to be divided between them, afterwards purchased the equity of redemption to them and their heirs, it was held, that there was no survivorship, upon the ground that the purchase was founded on the mortgage, and

the daughters being tenants in common of the mortgage, they were held to be tenants in common of the equity of redemption likewise. See 19 Ves. 444.

Another rule laid down by the Master of the Rolls in *Lake v. Gibson* is, that, in all cases of a joint undertaking or partnership, either in trade or in any other dealing, two or more persons who make a joint purchase will be considered in equity as tenants in common, or the survivors as trustees for the representatives of those who are dead. This was the ground of the decision in *Lake v. Gibson*, or *Lake v. Craddock*, which shows that a joint speculation in improving land, on a hazard of profit and loss, is treated, in a court of equity, as in the nature of merchandise, and the *jus accrescendi* is not allowed.

In favor of merchandise it is well known that an exception to the rule of survivorship has been long established. It is thus stated in Co. Litt. 182, a:—"An exception is to be made of two joint merchants: for the wares, merchandises, debts, or duties that they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth; and this is per legem mercatoriam, which (as hath been said) is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is pro bono publico; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*."

The exception in favor of merchants was afterwards extended to all traders; and courts of equity have extended it to the analogous cases of real property purchased for a joint undertaking or partnership in trade, or in any other dealing. It has been remarked by Sir James Wigram, V. C., that the consequences of the admission of the partnership contract were carried to a great length in *Lake v. Craddock*; "for," observed his Honor, "five original contractors, who had retired for nearly thirty years, were held bound by a subsequent contract, made by the other four, for the purchase of other lands in aid of the original design;" 5 Hare, 384. In *Jeffereys v. Small*, 1 Vern. 217, where two persons having jointly stocked a farm, and occupied it as joint tenants, the bill was to be relieved against survivorship, one of them being dead, Lord Keeper North was clearly of opinion that the plaintiff ought to be relieved, and said that, if the farm had been taken jointly by them, and proved a good bargain, then the survivor should have the *benefit of it; but as to a stock employed in the way of trade, that should in no case survive. That the custom of merchants was ex- [*153] tended to all traders, to exclude survivorship; and though it was common for traders in articles of co-partnership to provide against survivorship, yet that was more than was necessary; and he said he took the distinction to be, where two became joint tenants, or jointly interested in a thing by way of gift or the like, there the same shall be subject to all the consequences of law; but as to a joint undertaking in the way of trade or the like, it is otherwise; and decreed for the plaintiff accordingly. Lord Eldon, in commenting upon this case, observed:—"Jeffereys v. Small, has been approved, with some distinctions, in subsequent cases. It was held in that case, that, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive. I have a note of my own of a

case of *Elliot v. Brown*, upon the 25th of July, 1791, in which another distinction was taken by Lord Thurlow, that the law, with reference to the stock, would be the same as to the lease, *provided the lease was taken only upon the same purpose as the stock*, and the lease was only the substratum; and *Lake v. Gibson*, was referred to. The observation upon that was, that the purchase of the land was made to the intent that they might become partners in the improvement; that it was only the substratum for an adventure, in the profits of which it was previously intended they should be concerned:" *Jackson v. Jackson*, 9 Ves. 596. In *Elliot v. Brown*, (since reported, 3 Swanst. 489,) there was a lease of a farm to two partners; one partner dying, the other agreed to a division of stock with the representatives of the deceased partner, but insisted on holding the lease by survivorship; Lord Thurlow, however, thought the lease was accessory to the trade in which the parties were embarked, and granted an injunction to restrain the surviving partner from proceeding by ejectment to obtain possession of the farm. From Lord Colchester's MSS. See also 1 Vern. 217, n. (3).

So, likewise, in *Lyster v. Dolland*, 1 Ves. jun. 431, where two persons took a building lease, and laid out money in erecting houses, Lord Thurlow held them to be partners in respect to this property; and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased partner. "Though," observed his Lordship, "if two persons take a farm, the lease will survive, yet has it not been determined that if they lay out money jointly upon it, that turns round the estate at law, and makes it equitable? I allude [*154] to the case of a joint lease taken or a fee purchased to carry *on a joint trade; the object being to carry on the trade, the court thought it would convert the joint property for the purposes of trade, and making a common advantage. I am now clearly of opinion, that, if partners purchase leasehold or freehold to carry on trade, that will carry with it all those circumstances." See also *Crawshay v. Maule*, 1 Swanst. 508.

A deceased partner may, however, have so conducted himself by repudiating a contract, as for instance a lease of ground for a building speculation, as to preclude his executors from claiming a share in the lease: *Reilly v. Walsh*, 11 Ir. Eq. Rep. 22. And see *Norway v. Rowe*, 19 Ves. 143.

And if the conveyance is taken in the name of one of the partners, having been purchased with partnership funds, it will be part of the partnership property; *Smith v. Smith*, 5 Ves. 193; *Clegg v. Fishwick*, 1 Mac. & G. 294. And see *Tibbits v. Phillips*, 10 Hare, 355.

Where, however, property is *not purchased* by persons for partnership purposes, but is *devised* to them as joint tenants, although they make use of it for partnership purposes, they will not be held tenants in common in equity, unless by express agreement, or by their course of dealing with it for a long period, it may be inferred that they meant to sever the joint tenancy. In *Jackson v. Jackson*, 9 Ves. 591, a testator left leasehold and other personal estate embarked in trade to his two sons as joint tenants, who continued to carry on the trade for twelve years, when one of them died. Lord Eldon overruling the decision of Sir W. Grant, M. R. (reported 7 Ves. 535,) held,

that, under all the circumstances of the case, the two sons of the testator were to be considered as tenants in common of his property embarked in trade, from the time they were let into possession, including as well the capital as the profits; for, though there might be cases of distinction between them, the course of dealing for so many years ought to be taken as evidence that they meant to sever the joint tenancy. In the case, however, of *Morris v. Barrett*, 3 Y. & J. 384, in the Exchequer, a testator *devised and bequeathed* the residue of his real and personal estate to his two sons, their heirs, executors, and administrators. The two sons, after their father's death, during the period of twenty years, carried on the business of farmers with such estate, and kept the moneys arising therefrom in one common stock, and, with part of such moneys, *purchased other estates* in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other. One of the brothers died; and, upon a bill being filed by the legatees and persons beneficially entitled under *his will, it was admitted, by the counsel of the surviving brother, [*155] that the estates *purchased* with the profits of the business and the partnership stock were held by the brothers as tenants in common, but they contended that the leasehold estates and the personal estate which the father *bequeathed* to them were held by them as joint tenants; that where real estates, conveyed to persons as joint tenants, had been adjudged to have been held by them as tenants in common, the estates had been *purchased* expressly for the purpose of a partnership, or for a joint speculation, as in *Lake v. Craddock*, and that no case could be cited in which real estate *devised* had been converted from an estate in joint tenancy to a tenancy in common: Alexander, C. B., held, that the brothers remained joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased lands.

In *Dale v. Hamilton*, 5 Hare, 369, it was held by Sir J. Wigram, V. C., that a partnership agreement between A. and B. that they should be jointly interested in a speculation for buying, improving for sale, and selling hands, might be proved without being evidenced by any writing signed by, or by the authority of, the party to be charged therewith, within the Statute of Frauds: and that such an agreement being proved, A. or B. might establish his interest in the land, the subject of the partnership, without such interest being evidenced by any such writing. See S. C., 2 Ph. 266; and *Darby v. Darby*, 3 Drew. 495.

Where partners hold real estate for partnership purposes, a question arises, which was not decided in *Lake v. Gibson*, and *Lake v. Craddock*, (in which case the defendant Craddock, it will be observed, was both heir-at-law and executor of his father,) whether the real estate is not, even in the absence of any expressed intention of the partners, so absolutely converted into personalty as to be held by the surviving partners, not in trust for the heir-at-law, but for the personal representative, of the deceased partner.

It is clearly settled, that where real estate is purchased *with partnership capital*, for the *purposes of partnership trade*, it will, in the absence of any express agreement, be considered as absolutely converted into personalty;

and, upon the death of one of the partners, his share will not go to his heir-at-law, nor be liable to dower, but will belong to his personal representatives. See *Townsend v. Devaynes*, 1 Mont. on Partnership, Append. 97; 1 Rep. H. & W., Jac. ed. p. 346; *Selkirk v. Davies*, 2 Dow. 231. So, in *Phillips v. Phillips*, 1 My. & K. 649, Sir J. Leach, M. R., held, that freehold and copy-
 [*156] hold public-houses, purchased with partnership capital, *and conveyed to the two partners and their heirs, for the purposes of the partnership trade, were to be considered as personal estate generally, and not only for the payment of the partnership debts. "I confess," observed his Honor, "I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, *purchased with partnership capital for the purposes of the partnership trade*, continued to be partnership capital, and to have, to every intent, the quality of personal estate; and in the case of *Fereday v. Wightwick*, 1 Russ. & My. 45, I had no intention to confine the principle to the payment of the partnership demands. Lord Eldon has certainly, upon several occasions, expressed such an opinion. The case of *Townsend v. Devaynes* is a clear decision to that effect, and general convenience requires that this principle should be adhered to." This decision has been followed in *Broom v. Broom*, 3 My. & K. 443; *Morris v. Kearsley*, 2 Y. & C. Excheq. Ca. 140; *Bligh v. Brent*, 2 Y. & C. Excheq. Ca. 268; *Houghton v. Houghton*, 11 Sim. 491.

It seems, however, that where real estate belonged to the partners at the time of their entering into partnership, or has been subsequently acquired by them out of their own private moneys, or by gift, conversion will not, unless by express agreement, take place, although the real estate has been used for the partnership purposes in trade. In *Thornton v. Dixon*, 3 Bro. C. C. 199, three persons, *seised in fee* of some land called Broadmoor, entered into partnership for twenty-one years as paper-makers, and mills were erected upon the land, and they declared the uses of the land to themselves in fee, as tenants in common. They afterwards entered into a new partnership for twenty-one years, by deed, taking in four new partners interested in different proportions; and in the partnership deed there was a covenant from the three original partners to stand *seised* of the land in trust for the co-partnership, in the proportions in which they were respectively interested therein; and a proviso, that, in case any of the partners wished to dispose of his or their shares, he or they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. The partnership term expired, and they went on afterwards without any new agreement. During the second partnership they bought a freehold messuage with a little land adjoining, called Low Meerbeck, for the better carrying on the trade, which was enjoyed by the partners as joint tenants. Upon the death of one of the partners, who by purchase from the others had acquired one-half of the whole
 [*157] concern, the question arose, whether his share *was to be considered as real or personal property. Lord Thurlow, when the cause was first heard, said, he "had always understood that, where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the

partnership fund, and that, consequently Broadmoor and Meerbeck must be considered as personal estate, and distributable as such." However, when the cause came on again, his Lordship said, he "thought that, had the agreement been that the mills should be valued and sold, it would have converted them into personalty of the partnership; but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that, after the dissolution, the property would result according to its respective nature, the real as real, the personal as personal estate." It does not appear whether Low Meerbeck was purchased out of the partnership or private funds of the partners; if the former was the case, this part of the decision cannot be supported, as it is opposed to the doctrine laid down, *Phillips v. Phillips*. In *Balmain v. Shore*, 9 Ves. 500, three persons agreed to enter into partnership for ninety-nine years in the business of potters; and it was covenanted by the articles, that, in case of the decease of any of the co-partners, his share should belong to his widow for her life, and that, after her decease, her share of the joint trade should go to her children, and if there was no child, to her executors. Afterwards a china and pot manufactory, and other premises, were purchased by the partners, and conveyed to them as tenants in common in fee. The conveyance then recited the partnership, and declared that the premises should continue to be used in the partnership trade during the continuance of the partnership, and each of the partners covenanted that he would not, during the continuance of the partnership, sell his share, or sue out a writ or file a bill of partition. Sir William Grant, M. R., observed, "Here the parties have limited and defined the extent of the interest the partnership was to have in the real property. Considering themselves as owners of the real estate, as tenants in common, they stipulate that the partnership shall have a certain ownership, notwithstanding that interest in them as tenants in fee. The premises are to be continued to be used in the trade as long as the partnership lasts. They can claim nothing as partners, except through the covenants; subject to the covenants, it goes as real estate. Whether the heir can derive any benefit is another question. The question for my decision is only, whether I can declare this real estate to be personal property, to go as the shares of the partnership. That, I am *of opinion, I cannot declare." [*158] It was stated in the answers, that the purchase-money of the freehold premises was paid, not out of the partnership effects, but out of *the separate property of each partner*.

In *Cookson v. Cookson*, 8 Sim. 529, A. carried on trade upon land of which he was *seised in fee*. Afterwards he took one of his sons into partnership for twenty-four years, and conveyed to him in fee certain shares in the land; and, by their articles of partnership, they covenanted that the land should at all times thereafter be held as partnership property, and be considered and treated as part of the joint stock of the trade; and it was provided that, if either partner died or retired during the twenty-four years, his co-partner might purchase his share, at the sum stated to be its value in the last yearly accounts. In the course of the twenty-four years 1700*l.* was expended out of the partnership funds in building on the land. After the expiration of the

twenty-four years, and until A.'s death, he and his son continued to carry on their trade on the land, without entering into any new agreement. Sir L. Shadwell, V. C., held, that A.'s share of the land retained its original character, and descended to his heir. His Honor observed, that those cases could hardly be said to bear upon the subject, the foundation of which was, in effect, that freehold tenements were purchased for the benefit of the partnership out of the partnership assets, *for the father was originally solely seised in fee of the freehold tenements in question, and the whole benefit which the son took proceeded from the father by way of bounty exclusively, and there was no application of partnership assets to the purchase of the land in question for the purposes of the partnership*; and his Honor thought that the covenant could not be taken as showing that, for all intents and purposes and for all time, the effect of the dealing between the father and son was to make the father's shares personal property; for his Honor understood that covenant as having a very distinct meaning, namely, that during the partnership, and, if necessary for partnership purposes, after the expiration of the partnership, the shares which the father and son had respectively should be considered as personal estate; but that it would be quite absurd to say that the covenant should be so extended as that, though the land was not required to be sold for partnership purposes, it should have the effect of making that which was unquestionably land in its own nature absolutely personal estate, not for any beneficial purpose to the father or to the son, but for the purpose of making a sort of unnatural and unnecessary conversion of real assets into personal, as between the real and [*159] personal representatives of the two partners respectively. "In the first place," observed his Honor, in conclusion, "there was no purchase of the land out of the partnership assets for partnership purposes; and there are no stipulations in the articles of partnership which, upon a fair construction, can be said to have this effect, namely, as between the real and personal representatives of A., of converting the real estate into personalty; and it was not necessary for any partnership purpose that there should be any conversion."

Mr. Bisset, in his work upon Partnership, states that it appears from the MS. notes of Mr. Williamson, one of the counsel for the plaintiffs in *Phillips v. Phillips*, that the following important points were determined in that cause: First, that public-houses, *devised* by the uncle, who was a brewer, to the two nephews, who carried on the brewery as partners, were held not to be partnership property, although they were used exactly for the same purposes as other public-houses, which, having been purchased out of the partnership capital, were held to be partnership property, and to be converted into personalty. Second, that, where the uncle had mortgages of public-houses, whether in fee or for years, which he *devised* to his nephews, and the nephews *purchased* the equity of redemption out of the partnership funds, the equity of redemption was held to follow the mortgage, and not to become partnership property. See Bisset on Partnership, p. 50, and notes (a) and (b), where extracts from the decree as to these two points are given from the Reg. Lib.

Where, however, real estate was purchased for the purposes of a partner-

ship in trade, and paid for out of the partnership capital, but upon an agreement between the partners, that it was to be the separate property of one of them, who took a conveyance of it in his own name, Lord Eldon held, that he was debtor to the partnership for so much money as he borrowed, and that the property not being partnership property, his wife was entitled to dower of the whole. *Smith v. Smith*, 5 Ves. 193.

Where real estate is purchased by partners of the partnership capital, but not for the purposes of the partnership *in trade*, it will not be converted into personalty.

Thus, in *Bell v. Phyn*, 7 Ves. 453, three persons, carrying on business as merchants, in London, joined with another person in the purchase of a plantation in the Island of Grenada, two-thirds of which were to belong to the partners and the remaining third to another person. Part of the purchase-money for the two-thirds was paid out of the funds of the partnership, and the parties severally covenanted to pay the remainder. The accounts relative to the estate were kept in the partnership books. Further payments [*160] *were made, from time to time, out of the partnership funds, till the death of one of the partners. Upon the death of one of the partners, the question arose, whether his share of the estate was real or personal. Sir William Grant, M. R., held that it was real. "Suppose," observed his Honor, "this was partnership property, I doubt whether the conveyance is a conversion: there was no occasion to call for it for any of the purposes of the partnership. It remains clear. Each might have entered into the enjoyment of his share. Then suppose all die. Why is it to be considered personal property—something different from what it really is, as between the real and personal representatives? On a subsequent day his Honor said, that he doubted whether there was quite enough admitted by the heir to show that the estate at Grenada could be considered, in a proper sense, partnership property, but that the authority of *Thornton v. Dixon* went the full length of the point for the heir; for, even if it was partnership property, there was nothing done by the partners to alter the nature of it.

In *Randall v. Randall*, 7 Sim. 271, Richard and William Randall, tenants in common of an estate, in 1792 agreed to carry on the business of farming together, including the growing of hops; and in 1794 they entered into partnership as maltsters, and soon after as biscuit bakers. At that time, and during all the subsequent time, Richard Randall carried on his separate business of a land surveyor, and William Randall the business of a grocer. The farming and malting businesses were carried on upon the family estate, and the manufacture of biscuit partly on the family estate, and partly on Richard Randall's separate property. In 1802 Richard and William Randall purchased one-fourth of the family estate from their brother James; in 1803 land from Miss Long; and in 1805 land from Joseph Tarver. No conveyance was executed of the lands so purchased, except those purchased of Tarver, which were conveyed, as to one moiety, to the use of Richard Randall in fee, and, as to the other moiety, to the use of William Randall, and a trustee, in the usual manner, to bar dower. All the lands so purchased were paid for out of

the partnership moneys, and (excepting the family estate, where the malting and biscuit making were partly carried on,) were used solely for farming and agricultural purposes. In 1820, Richard and William Randall purchased, with partnership moneys, two messuages and gardens in Portsea, which were conveyed in the same manner as the lands purchased from Tarver. This property was not used for any partnership purposes, but was let to tenants. In [*161] or before 1815, all the partnership **business in trade* had been given up, but the farming business was carried on in partnership up to August, 1827, when it was terminated by the death of Richard Randall. Sir L. Shadwell, V. C., after an elaborate examination of the authorities, held, that, the lands were not converted into personalty. "It does not," said his Honor, "appear that the parties purchased any part of the land for the purposes of their *partnership in trade*. Having in the first instance agreed to carry on the farming business in partnership, they subsequently agreed to become co-partners, first as maltsters, and afterwards as biscuit bakers. The first purchase that they made was of an undivided fourth part of an estate, of which they previously had a moiety as tenants in common. It would, however, be strong to say, that, because these parties, being partners in the farming business *which is not a trade*, happen, collaterally to that business to carry on a trade, therefore the nature of a property which they so purchased is to be changed; and, consequently, I do not think that it would be right to hold, that one-fourth of the family estates which Richard and William Randall purchased of their brother James is to be considered as partaking of the nature of personal estate.

"The next estate was purchased of Miss Long, but it was never used for any of the purposes of the partnership trade; and, as the judges who decided the cases to which I have alluded, have expressed their opinions to be, that land cannot become personal estate unless it is purchased for the purposes of the partnership trade, the land purchased of Miss Long, although it may have been paid for out of the partnership capital, cannot be considered as partaking of the nature of personal estate.

"With respect to the land purchased from Tarver, it was conveyed, as to one moiety, to the use of William Randall in fee; and, as to the other moiety, to the use of William Randall and his trustee, to the usual uses to bar dower. Therefore, there was no contract, either express or implied, that it should have any nature except that which was originally impressed upon it.

"The malting business ceased in 1807, and the biscuit baking in 1815. In 1820, the two brothers purchased two houses and gardens in Portsea, which of course were not used for farming purposes, but were let to tenants. These premises were conveyed in the same manner as the land purchased of Tarver; and if in those instances in which the lands purchased by the brothers were conveyed to them, it is to be inferred from the form of the conveyance that they intended to hold them as real estate, it is but fair to conclude that [*162] they intended to hold those lands which were not conveyed to *them in like manner; for it would be unreasonable to suppose that they

meant to hold part as land and part as impressed with the character of personal estate.

"The fair inference to be drawn from the facts of this case is, that the trade was collateral to, and arose out of, the principal business of farming; there is no reason to conclude, from any of the decided cases, that any of the property to which this suit relates ought to be considered as personal estate."

If, however, the owners of real estate, upon entering into partnership, direct or agree that it shall be sold upon the death of one of them, it will be held to be absolutely converted into personalty, and will go to the personal representative, and not to the heir of a deceased partner. See *Ripley v. Waterworth*, 7 Ves. 425; *Thornton v. Dixon*, 3 Bro. C. C. 199. In the recent case of *Essex v. Essex*, 20 Beav. 442, two persons seised of freeholds agreed to carry on business in partnership upon the premises for fourteen years, and that if either died during that term, the survivor should purchase the freeholds at a stated price. The fourteen years having expired, they by parol agreement continued the partnership "on the old terms;" one of them afterwards died intestate. It was held by Sir J. Romilly, M. R., that the stipulation as to purchase was binding, and that the freeholds were converted into personalty, and did not pass to the heir.

So, likewise, property purchased with partnership capital, for partnership purposes in trade, and therefore converted into personalty, may be reconverted by the express or implied agreement of the partners. Thus, in *Rowley v. Adams*, 7 Beav. 548, A. and B. purchased realty out of their partnership assets, which was used for their partnership purposes, and was in equity to be considered as personalty. A new partnership was formed between A. B., and C. The realty continued to be used for partnership purposes, but A. and B. stipulated for a rent to be paid them by the new partnership, composed of A., B., and C. A. died. Lord Langdale, M. R., held, that the property was to be considered as part of his real estate.

The share of a deceased partner in freehold and copyhold estates, although purchased with partnership capital, and used for partnership purposes in trade, has been held not to be converted into personalty for the purpose of being included in the value or amount on which probate duty is payable: see *Custance v. Bradshaw*, 4 Hare, 315; where Sir J. Wigram, V. C. observes, "The case of the Crown rests wholly upon the proposition that the real estate of a partnership, purchased with partnership assets, and used for partnership purposes, is in equity, though not *in fact, personal estate; and the case [*163] of *Phillips v. Phillips*, was referred to as having carried out that principle, and determined that the real estate of a partnership is, in equity, personal estate, to all intents and purposes. It does not appear to me that a decision in this case against the claim of the Crown will conflict with that or any other case upon the same subject; and, consequently, in deciding against the claim of the Crown in this case, I am not called upon to express my opinion upon the judgment in *Phillips v. Phillips*. All that is necessarily involved in the cases referred to (including *Phillips v. Phillips*,) is, that those in whom property directed to be converted is vested, are trustees for the persons to whom

the personal estate of the owner may belong. The rule of equity relied upon by the Crown is fully satisfied by that interpretation of the rule, and the rule so interpreted decides nothing in the present case."

The result of these authorities appears to be this, that, in the absence of any agreement, and except for the purpose of the payment of probate duty, real estate purchased with partnership capital for the purposes of partnership in trade will in equity be converted into personalty; but, where real estate belongs to the partners, or has been acquired by them out of their private moneys, or by gift, although it is used for partnership purposes in trade, or if, although paid for out of the partnership capital, it is not purchased for the purposes of partnership in trade, it will, in the absence of any agreement or direction for its sale, retain the character of realty. See, however, Collyer on Partnership, 93, 2nd ed.

And it seems that conversion will take place not only where real property is acquired for the purposes of partnership in trade, but also where it is acquired with partnership funds for the purpose of re-sale upon a speculation not properly coming under the denomination of trade. Thus, in *Darby v. Darby*, 3 Drew, 495, where two persons on a joint speculation with their joint moneys, purchased land for the purpose of laying it out in building lots, and re-selling it at their joint profit or loss, it was held by Sir R. T. Kindersley, V. C., that the land was converted out and out, and that the share of a deceased partner in part of the unrealized real estate passed to his personal representatives. "I can have no difficulty," said his Honor, "in coming to the conclusion, that whenever a partnership purchase real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate. Now this is not the ordinary case, where persons carrying on the ordinary business of a commercial or manufacturing *partnership have found it necessary to purchase real estate for [*164] partnership purposes. That is not the case: here they bought land as stock in trade, by the sale of which they were to make their profits;—the land was not in the nature of plant, but was the very subject-matter of their trade. Does that make any difference? If it does, I think it is in favor of treating it as converted; because the real estate is here clearly put in the same position as ordinary stock in trade; and it appears to me, that if I entertained more doubt than I do on the general question, that doubt would in this case be very much diminished by the circumstance, that here the real estate is itself bought for the very purpose of selling it again. The very intention of the partnership was to buy land to re-sell it. That is their very contract; and, without selling the land again there would be no partnership business,—the partnership was for the purpose of buying land, to parcel it out in plots, and to sell them again; and each partner had a right to say he would have that contract carried out. We have here what Lord Thurlow wanted in *Thornton v. Dixon*, (3 Bro. C. C. 199,)—an actual contract that the land shall be sold."

Where, as in the principal case, lands are held for partnership purposes, that is to say, for employment for some purposes which may produce a return

in the shape of profits, so as to add to its value, the joint property will be liable to repay the advances of the various partners before any division can take place, (21 Beav. 536;) but this is not the case where persons are mere joint owners of lands. Thus, in *Kay v. Johnston*, 21 Beav. 536, the plaintiff and defendant were joint owners of a house, and the defendant had laid out, in improving and decorating it, moneys he had obtained from the plaintiff, it was held by Sir J. Romilly, M. R., that the plaintiff, in the absence of contract, had no lien on the share of the defendant in the house for the amount so laid out.

“There certainly are cases in which equity will consider joint tenants as tenants in common; and one of those cases is, where a purchase of land is made by two persons, with a view to expending large sums of money in the improvement of it;” per Tilghman, C. J., in *Duncan v. Forrer*, 6 Binney, 193, 196. See *Mayburry v. Brien et al.*, 15 Peters, 21, 36. In a case, in Pennsylvania, of a title under warrant and survey, where the purchase-money had been paid in equal portions by two persons, it was decided that the interest was not joint, but in common, chiefly upon the ground that the estate was not a complete legal one, but was only an inchoate interest, in the nature of an equitable estate. “If a patent had been issued to the two persons,” said Tilghman, C. J., “I incline to think, that the circumstance of their having paid the purchase-money equally, would not have been sufficient to render the estate a tenancy in common in equity. Such is the opinion of Lord Hardwicke in [*Rigden v. Valhier*,] 3 Atk. 735, although the contrary seems to have been taken for granted, in the argument of counsel, in 1 Vern. 361. But there are cases, where in equity, an estate will be considered as in common, although at law it is a joint tenancy. In such

cases, courts of equity proceed on the intention of the parties deduced from the nature of the transaction; as where several persons engage in an enterprise, which requires large advances besides the original purchase-money, the draining of marshes for instance, or the erection of mills or manufactories. The case of *Lake v. Craddock et al.*, 3 P. Wms. 158, was a purchase of lands overflowed with water, for the purpose of reclaiming them. This was considered as a tenancy in common, although the legal transfer was in joint tenancy. So if two advance money on a mortgage, though the estate is conveyed jointly, it shall be a tenancy in common.” *Caines v. Lessee of Grant*, 5 Binney, 119, 120. See *Cuyler and others v. Bradt and others*, 2 Caines’ Cases, 326; *Currie &c. v. Tibb’s Heirs*, 5 Monroe, 440, 443; *Overton v. Lacy, &c.*, 6 Id. 13, 15.

In regard to the case discussed in the preceding note, where a mortgage is made to two jointly as security for money advanced by both, there is a difference among the authorities in this country. In Massachusetts, although a statute provides that all conveyances to two or more grantees shall create a tenancy in common, unless an opposite intent be apparent, it is yet settled that a conveyance by mort-

gage to two persons in fee, to secure a joint debt, makes a joint tenancy, before foreclosure; upon the ground that as the remedy to recover the debt would survive upon the death of either, the intent of the parties must be that the collateral security of the mortgage should comport with the remedy by action, and therefore should survive; *Appleton v. Boyd*, 7 Massachusetts, 131, 134; but after foreclosure it becomes a tenancy in common in the land; *Woodwin v. Richardson, Adm.*, 11 Id. 469. And the decision in *Appleton v. Boyd*, has been followed in Maine; *Kinsley v. Abbott*, 19 Maine, 430, 434; where it is spoken of as convenient, and as affording the most simple remedies with the least liability to inconvenience and loss. Under a similar statute of Rhode Island, however, this construction was disapproved of in the Circuit Court, and it was held that the tenancy was in common, and that upon the death of one, the legal title to a moiety of the estate vested in his heirs, though as a security, the benefit of it followed the debt; *Randall v. Phillips et al.*, 3 Mason, 378, 384.

[The question when and under what circumstances real estate shall be considered as partnership property, has been the subject of much discussion in this country, and the cases as a whole amply show, that land bought with the assets and for the purposes of a partnership, will be partnership property in equity, although the deed may be taken in the name of the partners as tenants in common, or of one partner only, and without anything on its face to show the existence or rights of the firm; *Jarvis v. Brooks*, 7 Foster, 37; *Matlock v. Matlock*, 5 Indiana, 403; *Burnside v. Murdock*, 4 Metcalf, 537;

Champlin v. Tillinghast, 4 Rhode Island, 173, 208; *The Fall River Whaling Co. v. Borden*, 11 Id. 458; *Jones v. Neale*, 2 Patton & Heath, 339; *Peck v. Fisher*, 7 Cushing, 386; *Ludlow v. Cooper*, 4 Ohio, N. S. 1; *Moreau v. Saffaran*, 5 Sneed, 595; see 1 American Leading Cases, 494, 499; and will, therefore, from the moment of its acquisition, be subject to the equities of the partners as such, and of those claiming under them as creditors and purchasers; *The Fall River Whaling Co. v. Borden*, 10 Cushing, 458. Hence, a judgment against one of the members of a firm, will be postponed to a subsequent mortgage by the partnership; *The Lancaster Bank v. Miley*, 1 Harris, 544, while a similar preference will be given to an execution issued for a demand against the firm, over a prior writ for the separate debt of a partner; *Jarvis v. Brooks*; *Peck v. Fisher*; *Rice v. Barnard*, 20 Vermont, 479: although the lien arising from a mortgage or other lien, given or acquired to or by a separate creditor, ought to extend as far as the interest of his debtor, and cannot, as it would seem, be a nullity, unless the latter is in debt to the firm, or the assets of the firm are not more than adequate to the satisfaction of the joint creditors; see *post*, vol. 2, note to *Silk v. Prime*.

The right thus acquired by the partnership is, however, a mere equity, and will consequently be discharged by a transfer of the legal title to a purchaser for value, and without notice of the equity; *M'Dermot v. Lawrence*, 7 S. & R. 438; *Haile v. Henrie*, 2 Watts, 143; *Ridgway's Appeal*, 3 Harris, 177; *Coder v. Huling*, 3 Casey, 514; *Buchan v. Sumner*, 2 Barbour, Ch. 198; *Hale v. Plummer*,

6 Indiana, 121: *Tillinghast v. Champlin*, 4 Rhode Island, 173, 209; although notice will be implied in this as in other cases, whenever the circumstances are such as to justify the presumption, that the purchaser either knew, or remained wilfully ignorant; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 209: see *post*, vol. 2, note to *Le Neve v. Le Neve*. Some of the cases go further, and hold that the equity of the partners cannot be set up or enforced by or on behalf of the joint, against the separate creditors, unless the latter are shown to have had notice of its existence at or before the time when the debts came into existence; *Haile v. Henrie*; *Ridgway's Appeal*; but this would seem more questionable, and is contrary to the general rule that creditors are subject to all the equities of their debtors, and can take no right which the latter could not have enforced for their own benefit; *post*, vol. 2, note to *Bassett v. Nosworthy*.

A trust for the firm may, as it seems, arise out of, or be fastened upon a conveyance of land to one or more of the partners, in the absence of written evidence, on proof that the consideration moved from the partnership, or consisted of their funds or property, as in other cases where a purchase is made by one man, with the money of another; *post*, note to *Dyer v. Dyer*; or by a declaration or admission in writing, signed by the party sought to be charged; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 209; *Delmonico v. Guillaume*, 2 Sandford's Ch. 366; *Phillips v. Cramond*, 2 W. C. C. R., 441; *The Fall River Whaling Co. v. Borden*; *Buchan v. Sumner*; *Jarvis v. Brooks*, 7 Foster, 37; but cannot, apparently grow out of an oral agreement,

apart from, and without facts and circumstances of a nature to satisfy or obviate the Statute of Frauds, which requires a writing when real estate is in question. When, moreover, the trust is sought to be deduced from the nature of the assets which formed the consideration for the purchase, it will be open to the whole range of parol evidence, and may be rebutted by every species of proof which tends legitimately to show, that the equity is consistent with or should be subordinate to the legal title; *Phillips v. Cramond*, 1 American Leading Cases, 496, 4th ed. (See *Haile v. Henrie*, 2 Watts, 143, which restricts, and *Dale v. Hamilton*, 5 Hare, 369, *ante*, which goes as far the other way in extending, the right to raise a trust for a partnership by a parol evidence.)

There can be little doubt that the purchase of land by the partners, for the purposes of the partnership, and subject to an express or implied agreement that it shall be held for the benefit of the firm, will render it partnership property, even when the whole of the consideration is furnished by the partners individually, and no part of it comes from the assets of the partnership; *Roberts v. M'Carty*, 9 Indiana, 16; and the weight of authority would seem to be, that the investment of the funds of the firm in land, will not render it partnership property unless the purchase is made for partnership purposes, and will simply give rise to a resulting trust, for the partners individually, under which they will *prima facie*, take equal shares or moieties, unless shown to have been unequally interested in the consideration; *Coder v. Huling*, 3 Casey, 84. But the expenditure of partnership assets in the purchase of

land by one partner, without the assent or in fraud of his co-partners, presents a different question, and will, no doubt, give rise to a trust for the partnership; *Phillips v. Cramond*, 2 W. C. C. R. 441, *ante*.

The better opinion would seem to be, that land does not lose the character of realty, or acquire that of personalty, by the mere fact of becoming partnership property; and that it still remains land, although charged with an equitable lien for the payment of the partnership debts, and the balance of the accounts between the partners; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 207; *Dyer v. Clark*, 5 Metcalf, 580; *Buchan v. Sumner*, 2 Barb. Ch. 168, 201; *Lacy v. Waring*, 25 Alabama, 625; 1 American Leading Cases, 498, 4th ed; unless there is an agreement actually made between the partners, or implied from the nature of the partnership, that it shall be sold and distributed as money, when a conversion will result as in other cases where such an agreement is entered into by persons competent to make it; *Kramer v. Arthur*, 7 Barr, 165, *post*, note to *Fletcher v. Ashburner*. Dicta may be found the other way, and to the point that real estate owned by a partnership, is viewed by equity as personal property for all purposes, unless the rights of *bona fide* purchasers are in question; *Roberts v. M'Carty*, 9 Indiana, 16; *Moderwell v. Mullison*, 9 Harris, 257; *The Lancaster Bank v. Miley*, 1 Id. 544; *Pierce v. Trigg*, 10 Leigh, 406, 424; while the language held in *Black v. Black*, 15 Georgia, 445, and *Hoxie v. Carr*, 1 Sumner, tends to sustain the same view of the question; but the point did not arise in a shape for actual decision in any of these cases;

and it would certainly seem more reasonable to hold, with the Supreme Court of Massachusetts in *Dyer v. Dyer*, 5 Metcalf, 580, and with the High Court of Appeals of Maryland, in *Goodburn v. Stevens*, 1 Md. Ch. 420, that land does not necessarily cease to be land, by being charged with a trust for the payment of the debts, and rendered subservient to the other purposes of a partnership, and that any portion of it which may remain after the purposes of the trust are satisfied, will, in analogy to the rule laid down in *Ackroyd v. Smithson*, *post*, descend to heirs, and be subject to the other incidents of realty, instead of vesting in the representatives of the parties as personalty; *Galbraith v. Gedge*, 16 B. Monroe, 631; *M'Cullough v. Somerville*, 8 Leigh, 415; *Hall v. Plummer*, 6 Indiana, 621; *Green v. Graham*, 5 Ohio, 163. Equity should, as it would seem under these circumstances, follow the law, except in so far as it may be necessary to depart from it, and leave the legal title free to follow the path which the law has marked out; unless a different course is necessary to protect the equities of the partners; *Lacy v. Waring*, 25 Alabama, 625. And the safer ground on which to put the case of *The Lancaster Bank v. Miley*, seems to be, that an execution for a liability of the firm, is equally entitled to priority over an antecedent lien for the separate debt of one of the partners, whether real or personal estate is in question; *Buchan v. Sumner*, 2 Barbour's Ch. 178: a position which is undeniable when the partnership is insolvent, and which would appear to be thought applicable, in many of the states of this country, to solvent firms, *post*, vol. 2, note to

Silk v. Prime. It was held, accordingly, in *Hale v. Plummer*; *Galbraith v. Gedge*, 16 B. Monroe, 631, and *Goodburn v. Stevens*, 1 Maryland Ch. 420, that land bought or held as partnership property, is subject to the dower of the widow of a deceased partner, unless it has been stamped with the character of personalty for all purposes, by an express or implied agreement, although her right is necessarily subordinate, to the lien of the debts of the firm, and the state of the accounts between the individual partners. Hence, she will necessarily be barred if the partnership prove insolvent, and will be precluded from recovering until its solvency has been ascertained; *Goodburn v. Stevens*; while in *Goodburn v. Stevens*, the court went still further by denying her a proportionate share of the arrears of rents and profits, which accrued while the sufficiency of the assets was under investigation. "It may be answered," said Gookins, J., in delivering the opinion of the court in *Hale v. Plummer*, "that the widow of a deceased partner is not entitled to dower in real estate, held for partnership purposes. It is true that real estate may be so held for partnership purposes as to exclude the widow's right of dower; but we think it may also be so held as not to exclude it. Mr. Story says, that 'so far as the partners and their creditors are concerned, real estate belonging to the partnership is, in equity, treated as mere personalty, and governed by the general doctrines of the latter. And so it will be deemed, in equity, to all intents and purposes, if the partners themselves have, by their agreement or otherwise, purposely impressed upon it the character of personalty;' Story on Partnership, s. 93.

In the absence of any such agreement or act, the same writer says, 'there is a great diversity of judicial opinion, and of judicial decision, as to whether it is to be treated as real, or personal property. Upon looking into the authorities, English and American, it is quite evident that the effort to reconcile them would be a hopeless task, and we are left to adopt what seems to us the more reasonable rule upon the subject. In a late decision, in New York, Chancellor Walworth uses the following language: 'The American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, are various and conflicting. But I think they may generally be considered as establishing these two principles. First, That such real estate is in equity chargeable with the debts of the co-partnership, and with any balance that may be due from one co-partner to another, upon the winding up of the affairs of the firm. Secondly, That as between the personal representatives and the heirs at law of the deceased partner, his share of the surplus of the real estate of the co-partnership, which remains after paying the debts of the co-partnership, and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate.;" *Buchan v. Sumner*, 2 Barb. Ch. R. 165. See also, *Buckley v. Buckley*, 11 Barb. S. C. R. 44.

"The High Court of Chancery, in Maryland, has adopted the rule, as indicated by Judge Story, in the section quoted from his work on partnership. That court decided, in the case of *Goodburn v. Stevens*, that real estate of a partnership, though regarded in a court of equity as personal estate for

all partnership purposes, yet, in the absence of an express or implied agreement, indicating an intention to convert it into personal estate, it will, when the claims of the partnership have been satisfied and the partnership accounts adjusted, be treated in a court of equity as at law, as real estate, and be subject to the dower of a deceased partner; 1 Maryland Ch. Decisions, 420."

An additional circumstance in favor of this view of the question is, that while the personal property of a partnership is subject to the control of each of its members, and a *bona fide* purchaser from one of the partners will have as good a title as if he had bought from the firm, its real estate is governed by different principles, and cannot be sold without the concurrence of all the members of the partnership; *Galbraith v. Gedge*, 16 B. Monroe, 631; Story on Partnership, sect. 94: a sale by one partner to a purchaser with notice, passing, as it would seem, nothing more than his interest as an individual, subject to the debts of the firm, and to an account with his co-partners, even when professing to be made for partnership purposes, and to be of the whole interest of the firm; *Anderson v. Tompkins*, 1 Brockenbrough, 457; *Tapley v. Butterfield*, 1 Metcalf, 513; *Dyer v. Clark*, 5 Id. 580; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 219; 1 American Leading Cases, 499, 4th ed. He should, therefore, confine himself to selling that which he is really entitled to dispose of; and an attempt on his part to use the legal title, as a means of transferring any greater interest, to the prejudice of his co-partners, and the joint creditors of the firm, will be presumptive

evidence, not only of fraud on his part, but of collusion on that of the purchaser, if the latter is aware of the equity; which will vitiate the sale, and prevent it from operating as a purchase for value, and without notice, and thus barring the equity of the other partners; *Hoxie v. Carr*, 1 Sumner, 193. The death of the other members of the firm will, however, as it would seem, invest the surviving partner with the absolute control, both of the real and personal property of the partnership, for the purpose of winding up its affairs and distributing the proceeds among all who are entitled to them; *Andrews v. Brown*, 21 Alabama, 437; and enable him to confer a good title on a purchaser, free from all liability, on the part of the latter, for the subsequent application or misapplication of the purchase-money; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 219. But as the power thus acquired, is in strict subordination to the trust for the partnership, it must be exercised in the way best calculated to obtain the full value of the property. Hence, the estate must be sold as a whole, and not in separate shares or moities, and the surviving partner cannot sell or convey his legal right to the land, as a tenant in common, as his own, without committing a fraud which will attach to, and invalidate the title of those who buy from him with notice of the facts and circumstances, which render his conduct fraudulent; *Tillinghast v. Champlin*, 4 Rhode Island, 173, 219; *Lacy v. Waring*, 25 Alabama, 625; *ante*, note to *Elliot v. Merryman*. And in *Galbraith v. Gedge*, 16 B. Monroe, 631, 633, the right of a sole surviving partner to sell of his own motion, was denied, and the proper course said to

be to procure the concurrence of the heirs of the deceased members of the firm, either *in pais*, or by a resort to the aid of equity.

The subject was examined with much fullness and ability in the recent case of *Tillinghast v. Champlin*, 4 Rhode Island, 173, 219; and the following language, held by Ames, C. J., in delivering the opinion of the court. "The counsel for the respondent is mistaken in supposing, under such a state of facts as this, that the fact that the deed of this lot runs to the individual members of the firm of Gardner & Brother, as tenants in common, without describing them as co-partners, raises a presumption, in the view of a court of equity, that the property, thus bought and used, is intended to be kept as the separate property of the respective partners, which stands, until some express and even written proof is given to show the contrary intention. A court of equity does not ordinarily, in relation to such a subject, base its presumptions upon mere forms, but rather upon facts which lead to the substantial truth and justice of the case. The well-settled presumption in equity is precisely the other way. As said by Chancellor Walworth, in *Buchan v. Sumner*, 2 Barbour's Ch. R. 198, 199, 'Where real estate is purchased with partnership funds for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, it has never been doubted in England, that such real estate was in equity, to be considered and treated as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners as between

themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those beneficially interested in the fund, not only during the existence of the co-partnership, but also upon the dissolution thereof by the death of some of the co-partners or otherwise.' And see the cases cited by him, and to same effect, *Hoxie v. Carr*, 1 Sumn. 181, per Story, J. In this last case, Mr. Justice Story says: 'But the circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary to the operations of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property; and in the absence of all countervailing circumstances, it will be absolutely decisive.' 'In whosoever hands the legal title may be placed, whether in one or all of the co-partners, and whether the deed describes them as co-partners or as tenants in common, if the property be purchased with the funds, and for the use of the firm, the decisive presumption in the absence of proof to the contrary is that it was intended to be held as partnership property.' *Hunt v. Benson*, 2 Humph. 459; *Buchan v. Sumner*, 2 Barb. Ch. R. 205; *Smith v. Tarlton*, Id. 336, 338; *Delmonico v. Guillaume*, 4 Sandf. Ch. R. 366; *Dyer v. Clark*, 5 Metcf. 578, 581; *Howard v. Priest et al.*, Id. 585; *Burnside et al. v. Merrick et al.*, 4 Id. 541; 1 Am. Lead. Cases, Hare & Wallace's notes, 488, and cases cited; Collyer on Partn. sect. 154, where see the result of all the authorities stated. The line of cases cited and relied on by the counsel for the

respondent upon this subject will be found to refer to the question whether real estate of a co-partnership, upon the death of one of the co-partners, and *after the debts have been paid and the equities adjusted between the several members of the firm*, belongs, in equity, to the executor or administrator of the decedent as a part of his personal property; or whether the beneficial interest, as well as the legal title, in the decedent's share of such real estate, descends to his heirs at law. Upon this question of equitable conversion of real into personal estate as between the heir and personal representative of a deceased partner, Lord Eldon overruled the latest decision of Lord Thurlow and the decision of Sir William Grant, and held in *Devaynes v. Devaynes*, Montague on Partn. App. 97, in favor of the conversion, and consequently in favor of the title of the executor or administrator, to such surplus. His ruling upon this point seems to have been generally followed by the later chancery judges in England; although two or three recent cases, in which the circumstances were special, have been decided in favor of the heir. The American cases, on the other hand, generally adopt the conclusion that the deceased partner's share of the surplus of the real estate of the co-partnership which remains after paying the debts of the co-partnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is, as between the heirs-at-law and personal representatives of the deceased partner, to be considered and treated as real estate. *Dyer v. Clark*, 5 Metc. 578, 579; *Howard et al. v. Priest et al.*, Id. 585, 586; *Burnside et al. v. Mer-*

rick et al., 4 Id. 541, 544; 1 Am. Lead. Cas., Hare & Wallace's notes, 491, 492, and cases cited. The whole subject is, however, so luminously treated by Chancellor Walworth, in *Buchan v. Sumner*, 2 Barb. Ch. R. 198, and onwards, with a full discussion of the cases, English and American, up to the time of his judgment, (1847,) that nothing need be added; and indeed the question of what shall become of any surplus of such property, after the equitable trust under which it is held is satisfied out of it, is so foreign to the case before us, that we should not have mentioned it, except in answer to the cases with regard to it, cited and relied upon by the counsel for the respondent.

"It was noticed, too, by the counsel for the respondent, that in *Dyer v. Clark*, *Howard et al. v. Priest et al.*, and *Hoxie v. Carr*, the respective deeds under which the partners in those cases held the real estates there in question, described them as co-partners, as if that were the ground of decision in either of those cases. That the deed did describe the grantees as co-partners is true of the case of *Dyer v. Clark*; but it is true only of one of the *two* parcels of land in question in *Priest et al. v. Howard et al.*, which were conveyed by separate deeds; the land and store in Moon-street, Boston, being conveyed to the two partners as tenants in common, and not describing them as co-partners; 5 Metc. 583. In *Burnside et al. v. Merrick et al.*, 4 Id. 537, decided at the same time, the deed does not seem to have described the grantees as co-partners, as is shown by the mode in which the court state the question on page 541. It is evi-

dent, therefore, that the absence of such a description in the deeds was not deemed controlling in either of those decisions. In *Hoxie v. Carr*, Judge Story notices that one of the deeds from a former proprietor to the co-partners, Reynolds & Hoxie, of his interest in the thirty-seven acres of land thereby conveyed, bounds it, on one side, on a three-acre lot, stated to belong to the West Greenwich Manufacturing Co. and which formed part of the premises in dispute, and that the deed from Reynolds to Carr spoke of the whole as *formerly* belonging to the same company. No doubt a chancellor would seize hold of such a feature in a case before him, for the purpose of strengthening the presumption raised by the substantial fact that the estate was purchased with the co-partnership funds, for the co-partnership use; but we have already seen that Judge Story put the latter as the main ground of presumption and not the former fact; liable to be rebutted, of course, by any controlling agreement or act of the co-partners. This feature,—deemed so controlling,—exists in very few of the American cases, and in none of the English cases that we recollect. In *Delmonico v. Guillaume*, 2 Sándf. Ch. R. 366, the deed of the farm adjudged by the chancellor to be co-partnership property, was originally executed to John Delmonico, who subsequently executed to Peter Delmonico a deed conveying to him an undivided half. But without taking more time in commenting on particular cases, all of which have, of course, their peculiar features more or less marked and more or less controlling the judgment of the courts before which they were heard, it is

clear from them, that the trust in favor of the firm is held to result from the fact that the consideration was paid by it, as in other cases of resulting trusts; and the implication of this trust is held to be confirmed by the fact that the property was bought for the use of the firm and actually used in its business, when no agreement, or conduct implying such an agreement, prior, or subsequent to, or at the time of the purchase, is proved, to indicate an intention on the part of the co-partners to hold the real estate thus purchased by them in undivided shares as their separate property.

"The other question involved in this cause, that is, whether the title to the property in question acquired by the respondent, Champlin, is, under the circumstances, held by him subject to, or exonerated from, the trust with which it was clothed in the hands of his grantor, remains to be considered.

"Beyond doubt, a *bona fide* purchaser or mortgagee of partnership lands, who obtains the legal title from the person in whom it is vested without notice of the equitable rights of others in the property as a part of the funds of the co-partnership, is entitled to protection in courts of equity as well as in courts of law. Per Walworth, Chancellor, *Buchan v. Sumner*, 2 Barb. Ch. R. 198. To this extent, and no further, go the decisions in the cases of *McDermot v. Lawrence*, 7 Serg. & Rawle, 438; *Forde v. Heron*, 4 Munf. 416; *Haile v. Henrie*, 2 Watts, 143; *Ridgway's Appeal*, 3 Harris, (15 Penn.) 177, and the remark of the court in *Sigourney v. Mann*, 7 Conn. 11, relied upon by the counsel for the respondent. Holding, as we do, that this real estate was co-partnership property, the legal title

to the undivided half was held by the surviving partner, according to every authority on this subject, English and American, cited on either side, in trust, for the payment of the debts of the firm, and of any balance that might be due to the estate of the deceased co-partner upon the settlement of the partnership accounts. For the purpose of executing this trust, though but half the *legal* title was vested in him, the surviving partner had the right in equity to sell the whole beneficial interest in the estate; and a court of equity would assist the purchaser by contract, to get in the legal title to the other half from the heirs at law of the deceased co-partner, even though they were infants. *Delmonico v. Guillaume*, 2 Sandf. Ch. R. 366-368, and cases cited; *Dyer v. Clark*, 5 Metc. 576; *Howard et al. v. Priest et al.*, Id. 585; *Burnside et al. v. Merrick et al.*, 4 Id. 540, 541, 545; *Andrews v. Brown*, 21 Ala. 437; *McAlister v. Montgomery*, 3 Hayw. 94. On the other hand, the surviving partner, though he may be clothed with the whole legal title, has no right or power to divert the trust property to his own private uses, in derogation of the rights of the creditors of the firm, or of those entitled to the estate of his deceased co-partner. If he were to attempt it, a court of equity would, upon proper application, restrain him from so doing, remove him from the trust he was violating, and appoint a receiver in his stead. If he convey the trust estate for such a purpose to any one cognizant of the trust with actual, or under such circumstances or in such form or mode as to give constructive, notice of his design to violate it, the person taking the conveyance, though a pur-

chaser for full value, takes it subject to the same trust, though the consequence may be to deprive him of the whole benefit of his purchase. It is only the *bona fide* purchaser for value, who, as in the cases already cited, purchases it in ignorance that it is co-partnership or trust property, or, as in cases that might be supposed, knowing that it was co-partnership property, takes the title in such form and under such circumstances as to indicate to him that it is sold and conveyed for the purpose of applying the proceeds to the proper uses of the trust, that can hold the title exonerated from the trust. Such a purchaser does not stand in equity merely upon the derivative title of his grantor. Invested with the legal title, he securely rests upon his own equities as an honest purchaser, without notice and for value—always protected—always a favorite, so to speak, in a court of equity. We agree with the counsel for the respondent, that it will not do to say, as taking the language of the courts away from the connection in which it is used in some of the cases that have been cited, and especially in the case of *Hoxie v. Carr*, it has been said before us, that, under all circumstances, he who purchases the real estate of a co-partnership from the surviving partner, knowing it to be such, and knowing that there are co-partnership debts, will take the estate subject to those debts. Much less is it true, as it has been contended, that such an estate can be administered, and a title to it given, only through the intervention of a court of equity. Such a partner, certainly, and each partner of a dissolved firm, unless deprived of it by contract, has, in equity, precisely the same power to deal with

the co-partnership property as during the continuance of the co-partnership, though liable in proper cases to be deprived of that power by the appointment of a receiver. Per Turner, Lord Justice, *Butchart v. Dresser*, 31 Eng. L. & Eq. R. 121. If the legal title in co-partnership lands be in him, he may dispose of and convey the whole beneficial interest in those lands for the purpose of realizing the proceeds of sale, and of applying them to the payment of the debts of the firm and of the final balance that may be due to him as co-partner; and a court of equity will not interfere most surely with this exercise, which duty imposes, or his said claims justify, of his *jus disponendi*. So far from it, it will, as we have seen, if the legal title be in part only vested in him, or be wholly vested in another, assist him in the exercise of his right, by compelling the conveyance of the legal title to himself, or to a purchaser from him, when such a conveyance is needed to enable him to perform his duty to others, or to satisfy even the demands that he may have as co-partner upon such property of the firm. In such cases, the purchaser, though he know that he has purchased co-partnership property, and that there are co-partnership debts to be paid out of it, yet if he honestly buy the property of and pay for it to the surviving partner with no knowledge of, and under circumstances from which a court of equity implies no notice of, an intended misapplication by the partner of the proceeds of sale, will not be liable, on account of any fraud, default, or miscarriage of the surviving partner with regard to them. It is a strict logical sequence, that the right to dispose of such property on the part

of the surviving partner, implies and requires the right to buy it, on the part of an honest and careful purchaser; nor is this, as has been contended before us, one of that class of trusts, in which, notwithstanding the power of sale on the part of the trustee or surviving partner, the purchaser knowing that he is purchasing trust property is bound to see to the application of the purchase-money; or, in this case, to see that it is applied to the payment of the co-partnership debts. We grant that such a notion is inferable from the language used by Mr. Justice Story, in *Hoxie v. Carr*, 1 Sumn. 192, if it be proper to disconnect his language from the case before him, or to suppose that he intended accurately to state all the conditions of the case in which, under all circumstances, a purchaser of the real estate of a partnership from a co-partner of a dissolved firm would take the estate subject to the burden of the trust. But such an inference would do great injustice to that learned judge, who to great acquisitions added a keen sense of justice. He was speaking in relation to the case before him, which we shall have occasion hereafter to compare with and apply to this. A surviving partner, in the sense in which he is a trustee of the real estate of the co-partnership, is certainly a trustee with as clear a power to give receipts for the purchase-money, upon sale, as to give receipts to the debtors of the firm, upon payment to him of the co-partnership debts. This results from his power and duty, so far as necessary, to convert the partnership property into money, and therewith to pay the co-partnership debts and to settle the final balance, if any, which may be

due, upon settlement of the co-partnership accounts, to the representative of his deceased co-partner. It was never dreamed, in a court of chancery, that his fell within that class of trusts, in which, tested by the well-known distinctions of the leading case of *Elliot v. Merryman*, Barnardiston's Ch. R. 78, the purchaser was bound to see to the application of the purchase-money, provided he knew that he was purchasing a portion of the trust estate. Thus to limit his power of sale, would be to load the settlement of the co-partnership estate with an intolerable burden,—lessen it at once to one-half its value, as a subject of sale,—and, as contended by the counsel for the complainant, necessarily draw the settlement of every such estate into a court of chancery to be administered and sold under its orders, for the protection of purchasers and the consequent realization of the value of the property of the firm. How foreign all this would be to the course of chancery with regard to such a trust, may be seen by the examination of the case above cited, and the admirably arranged collection of authorities, American as well as English, which, allowing for the difference of circumstances, have, in the main, followed it for upwards of an hundred years, found in 1 White & Tudor's Leading Cases in Equity, with Hare & Wallace's notes, *ante*, 101, 123. The only danger to a purchaser of the trust estate from a trustee of the class in which a surviving partner is to be ranked can arise from his becoming a party to a breach of trust on the part of the trustee, or from his making his purchase under such circumstances as to visit him with constructive

notice that a breach of trust, as to the purchase-money, is designed; *Eland v. Eland*, 4 Mylne & Craig, 18 Eng. Cond. Ch. R. 427; *Hill v. Simpson*, 7 Ves. 152; *Champlin v. Haight*, 10 Paige, 275; and see *Rogers v. Skillicorne*, Amb. 189; *Walker v. Smalwood*, Id. 676; *Lloyd v. Baldwin*, 1 Ves. 173; *Watkins v. Cheek*, 2 Sim. & Stu. 1 Eng. Cond. Ch. R. 199.

“That a gross fraud has been perpetrated by the surviving partner in this case, by the sale of the undivided half of this real estate of the firm of Gardner & Brother, and absconding with the proceeds, is admitted on all hands; and the question which we are to decide, is, whether the consequences of this fraud are to fall upon the creditors of the firm and the estate of the deceased co-partner, or upon the respondent Champlin, who, as he alleges and proves, paid full value for his purchase. In the view in which the state of the proof compels us to regard this case, it will be a hard case which ever way we decide it; and the question simply is, whether, under the circumstances of his purchase, the respondent, Champlin, having obtained the legal title to an undivided half of the real estate of the firm in question, has an equal equity with the creditors and the estate of the deceased co-partner to the beneficial interest of the moiety purchased by him. If he has, he cannot be disturbed in the full enjoyment of his purchase by us, whatever may be the consequences to them; if he has not, our course and duty will be plain before us, whatever may be the consequences to him. This question, in our judgment, depends upon the solution of two other questions, mainly questions of fact.

"First. Did he know that he was purchasing the property of the firm of Gardner & Brother? needed for the payment of the debts of that firm, or to settle any balance of the co-partnership accounts due to the estate of the deceased co-partner? and

"Second. Are the circumstances under which he made his purchase, and the nature of the interest conveyed to him, such as in the view of a court of equity, give him notice of the breach of trust intended by Benjamin W. Gardner, from whom he took his deed?

"He has sworn in his answer that he did not know that this real estate was co-partnership property; but supposed that it was the separate property of the two co-partners, held by them as separate property, according to the form of the deed under which they held it, as equal tenants in common. Now this may be quite true in one sense; for he probably did not know how a court of equity regards real property held by the co-partners under a deed in that form, when bought with the money and credit, and held for the uses of the co-partnership; and indeed the whole manner in which this co-partnership was attempted to be settled, both by Benjamin W. Gardner and the administrator of William A. Gardner, shows a gross ignorance of the law relating to this whole subject. But such ignorance, though it might relieve him under some circumstances from the imputation of actual fraud, cannot aid him in the view of a court of equity, when called upon to determine whether he had legal notice of a fact, or to adjudge the legal effect of his acts. If, knowing the facts that this property was bought with the partnership

funds for partnership use, and was exclusively used by the partnership during the whole term of its continuance, he took upon himself to determine, from the form of the deed under which it was held by the co-partners, that it was not co-partnership property, he took upon himself, in a matter of law, to be wiser than the law; and if mistaken, has no one to blame for his presumption but himself. The aid of the able counsellor who has argued his case, invoked before he made his purchase, might have been even more helpful to him in this particular than circumstances have allowed it to be.

"Now, for us to doubt that the respondent, Champlin, knew these facts which appear, from the proof, to have been notorious in the village of East Greenwich, and which the partners themselves, by their daily acts and repeated declarations, took pains, for the sake of obtaining credit for their firm, to make so, would suppose on our part a degree of skepticism quite unfitting us for an office which requires us, in matters of proof, to weigh and decide upon probabilities. Although, during a portion of the time, at least, of the continuance of this co-partnership, the respondent owned and occupied a farm a few miles off, in West Greenwich, yet the occasions of his business and pleasure, as proved, brought him frequently to the village of East Greenwich, where the firm did business, and where the works in question were situated, and where, also, the respondent's mother and family resided. His personal and business relations with both the members of this firm were intimate. His sister was the wife of William A. Gardner, and Benjamin W. Gardner boarded

with his mother, and was thought to be attentive to an unmarried sister, and he was frequently with both the co-partners, and was advised with about their business. He bid off for William A. Gardner, at auction, the very lot upon which these works were situated, when sold by the town of East Greenwich, and must have known the openly declared purpose for which it was bought. From the proof, no one could have been more cognizant of the credit and capital upon which the firm did business, and out of which they built up the property in question. This intimacy continued with Benjamin W. Gardner, after the decease of William A. His brother, Robert H. Champlin, was the original administrator appointed on the estate of William A. Gardner, and he himself took apparently a great interest in the affairs of the estate, frequently attending the courts of probate when questions concerning it were there agitated, and seeming to be a prominent actor in its affairs. He knew, or affected to know, the precise condition of the estate of his deceased brother-in-law; and informed the witness, David W. Hunt, a creditor of the firm to the amount of \$400, only some six weeks after the death of William A. Gardner, that he would get his whole debt,—that the debts of the estate were about \$3,000, and that there would be property enough to pay them all; though he declined the offer of the witness to guarantee the payment of his debt for a commission of five per cent. In his answer, he admits that both at the decease of William A. Gardner and at the time of the taking of his deed, he knew that the firm owed debts, though not the amount; and although he denies that he knew that the firm was

insolvent, yet it is evident from the fact, and his means of knowledge concerning it, that he must have known that it was grossly so, and that nothing was done by the surviving partner, who still continued to use the property of the firm, to pay any of its debts. A purchase made of a surviving partner thus situated and thus conducting, to the knowledge of the purchaser, would be required by a court of chancery to be made under circumstances of openness, publicity, and consultation with all interested in the estate, and in a mode quite free from suspicion in all respects, before the purchaser could affect to stand before it upon as high a ground of equity as the creditors of the firm, or the representatives of the estate of the deceased co-partner.

“But what were the circumstances of this purchase, and the mode in which it was effected? Without communication, so far as the evidence shows, with the representative or heirs of the deceased co-partner, in the latter of whom the legal title to the other undivided moiety of this estate was vested, and in the disposition of which the former was interested in relief of the estate of his decedent, he is found with Benjamin W. Gardner one evening, as late as 9 o'clock, rousing up a justice of the peace to take the latter's acknowledgment of the deed in question, ostentatiously hands over to the justice \$1,200 in the first place to count, as the consideration of the deed, and then hands over that, with \$50 more, to make the precise amount, to Benjamin W. Gardner, who delivers to him the deed. After this they are seen together in conversation coming from the house as late as 10 o'clock, and this is the last that

we hear of this consideration money or of the surviving partner, Benjamin W. Gardner, who that same night, or early the next morning, absconded with the whole of it and probably much more, and has never been heard of by the creditors of the firm since.

"Now grant that, considering the denial of the answer, there is here no such proof of community of corrupt design and action between the seller and the purchaser, so pointedly charged in the bill, as will justify us in holding that the charge is proven; yet there are circumstances creating grave suspicion which cannot be overlooked in a court called upon to weigh and balance the equities of such a purchaser with the undoubted equitable rights of the creditors of the firm. If this secrecy and cover of night in this transaction were sought at the suggestion of the seller, they should have excited the suspicion of the purchaser; if sought by the latter, considering the other facts attending the execution of the deed, they go somewhat further, and certainly do not aid the case of the respondent.

"But further, and most especially, it is to be considered, that this was an insolvent firm, with a large amount of debts outstanding whose existence was known to the respondent, and none of which he knew had been paid by the co-partner whose duty it was to pay them, and with whom he was dealing. He was taking from this partner a conveyance of a portion of what he knew, or should have known, as a matter of law, was the property of the firm; and certainly knew, as a matter of common honesty, should be applied to the payment of its debts. This mill property should have been sold together, as a whole, if the purpose

had been to realize the most from it for the benefit of the creditors; and no one could have known this better than a sharp, active man of business, such as the respondent is proved to be. To sell it in undivided shares was to sacrifice a large portion of its value; for no one would buy the other half except the respondent, and he could get it almost at his own price; and the proof is, as might have been foretold, and should have been foreseen, that, as the consequence of this transaction, neither half of this property is worth the nominal amount of the consideration paid by the respondent for the moiety thus purchased by him.

"We do not say that under no circumstances can the sale by a surviving partner of an undivided moiety of the real estate of a firm, the legal title of which is to that extent vested in him, be upheld in a court of equity. Such a sale may be made with such consent of all parties interested in it, with such publicity, and may even be so advantageous in some conceivable cases, as a mode of sale, as to be approved and even directed by a court of equity. But when, as in this case, a surviving partner in whom one half of the legal title of the real estate of the firm happens to be vested, affects privately to convey to one who knows that it is partnership property, precisely that undivided half, treating it as if it were beneficially his own, he thereby gives presage of an intent to convert the proceeds to his own use, instead of applying them to the uses of the firm whose property it is. The purchaser must know, if the property be co-partnership property, that the state of the legal title cannot represent in whom the beneficial interest

in it is really vested; and in what proportion, if in any proportion, in him from whom he is taking the title. The very fact that he knows that it is co-partnership property, and especially, as in this case, that there were co-partnership debts outstanding to a large amount, gives him notice that others are interested in the estate than him with whom he is dealing, with whom he should in all fairness communicate, as entitled to know what disposition is about to be made of their own. But if he will privately and secretly contract with and pay his money to a surviving partner for his legal title, who by the form of the transaction is treating the matter as if he deemed the property as his own, and meant to appropriate the proceeds of sale, as his own to his own use, it is doing him no more than justice for a court of chancery to inform him, that he shall have precisely what in such a mode of purchase, and under such circumstances, he had a right to expect,—the legal title only; the beneficial interest to go to those, to whom, in equity, it belongs. Though warned by the surroundings of the transaction, he chooses to rely solely upon the good faith and honesty in his trust of the mere owner of the legal title, who may not, as he should know, have a *scintilla* of interest in the beneficial estate, and must abide by the result of his misplaced confidence, if such it turn out to be. If added to all this, there be, as here, circumstances of suspicion hanging about the execution of the deed, looking at the time and mode of conducting it, and the sudden absconding at the close of the transaction of the surviving partner with the proceeds of sale, we cannot estimate the equities of the purchaser

at so high a value as to allow them to counterbalance the clear and undoubted rights of the creditors of the firm in whose aid our jurisdiction is invoked by the equitable representative of the rights of the deceased co-partner. In *Hoxie v. Carr*, 1 Sumn. 193, the fact that the deed was executed by one co-partner only, was alluded to by the learned judge who tried the cause, as showing 'that the purchasers should and ought to have known, that without a joint conveyance or release from all the partners, no absolute conveyance could be acquired by their grantee, Reynolds. They were put upon inquiry to ascertain whether any such conveyance or release had been made; and they cannot now set up their ignorance of law to excuse their want of diligence;' and he then goes on to show that if the purchasers in that case had made inquiries, that they would have ascertained the very facts which the evidence convinces us that this respondent knew. Indeed, the learned and accurate commentators upon this and the class of cases to which it belongs,—Messrs. Hare & Wallace,—say, that 'it is a consequence of the principle of land being affected with a trust as co-partnership property, that when one partner disposes of his separate interest in land held as co-partnership stock, to a purchaser having notice, he sells only his residuary interest, after the partnership debts and the share of the other partner are paid;' 1 Am. Lead. Cas. Hare & Wallace's notes, 492.¹ Such was evidently the idea of Mr. Justice Story, as expressed in his decision in the case of *Hoxie v. Carr et al.*; and

¹ The note cited above is from the pen of the late Mr. Wallace.

such was the opinion expressed by the Supreme Court of Massachusetts, in *Dyer v. Clark*, 5 Metcalf, 580. 'But if,' says the learned chief justice of that court, in delivering its judgment in the latter case, 'a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.' It is true, as suggested by the counsel for the respondent, that in case of a dissolution by death of a firm consisting of but two co-partners, the sole power to dispose of the co-partnership property and apply it to the payment of debts and to close the co-partnership accounts, survives to the surviving partner; and thus, that he is the only person, as long as he is suffered to exercise the trust, to act in its administration. But the surviving partner is but a trustee; and if he from his secret and suspicious mode of dealing with the trust property, treating it by the very mode of his conveying it as if it were his own, and regardless of the interests of the creditors of the firm as to the residue, sells to a purchaser an undivided share of it, because the legal title to that share happens to be vested in himself, we deem that he thus apprises the purchaser of his design; and that, under such circumstances, his absconding with the proceeds of sale should be regarded as little more than the fulfilment of a reasonable expectation on the part of the purchaser."

Whatever the rule may be under ordinary circumstances, it would seem

certain, that the real estate of the partnership will be regarded as personalty, whenever the nature of the agreement between the parties, or the nature of the purpose for which it is purchased, is such as to manifest the intention that it should be sold, and distributed as money, and not retained or held as land; *Ludlow v. Cooper*, 1 Ohio, N. S. 1; *Kramer v. Arthurs*, 7 Barr, 165. Thus, in *Kramer v. Arthurs*, the object of a joint stock association, formed for the purpose of buying and selling land, and dividing the profits which might accrue among the stockholders, was said to be obviously, to deal with the land when bought as a mere commodity, and to look not to it, but to what might be got by selling it, for compensation; and the interest of its members, as between themselves, and those claiming under them, with notice, a mere right to the proceeds or profits which might arise or remain on the winding up of the association, which partook of the nature of personalty, and could not be bound by the lien of a judgment. And it was consequently held, that the plaintiff, whose title originated in a sheriff's sale, under a judgment against Havens, one of the members of the company, who acted as its trustee and agent, must be postponed to the plaintiff, who claimed under a conveyance, which, although subsequent to the judgment, was made in pursuance of the purposes of the association, and agreeably to the provisions of the contract by which it was constituted. "That an incorporated joint stock company," said Gibson, C. J., in delivering the opinion of the court, "is an ordinary partnership, and that there may be a partnership to deal in lands, are elemen-

tary principles that have not been disputed. The latter was expressly recognized by this court in *Brady v. Calhoun's Administrators*, 1 Penna. Rep. 147. 'Partnerships,' says Gow on Partnership, 6, 'are not necessarily confined to trades in commercial adventures. They may lawfully exist in cases unconnected with commercial speculations. For instance, a partnership may exist between attorneys or farmers, as well as between merchants or bankers.' It would be absurd to let the nature of the article dealt in change the nature of the contract; or not to let partners give to land the attributes of a commodity, as between themselves and those standing in their place, especially in a country where it is a chattel for payment of debts, and not unfrequently a subject of speculation. Where it is brought into a concern as stock, it is, as between the partners and a person who has knowingly dealt with one of them for it, to be treated as personal estate belonging, not to the partners individually, but to the company collectively. The members of this company, being sharers of profit and loss, were partners to the world; but, between themselves, they had only a contingent interest in the profits to be derived from the lands when the concern should be wound up, not a vested estate as tenants in common of the lands themselves; and, to a purchaser with notice, or its equivalent, neither of them could part with more, either by a voluntary or an involuntary conveyance. As an agent entitled to a third of the profits in compensation of his services, it cannot be said that Havens had any property at all in the corpus of the stock; and as to him, or a purchaser from him with notice, or the

means of it, the joint creditors would have been entitled to priority of satisfaction without aid from the special provisions in the articles. But even if his title as a shareholder had given him a several estate in the land, it would have given him no more than an undivided twentieth part of each tract, and no more could have been sold on a judgment against him by a separate creditor; certainly not the entire tract, as was done here. But the lands constituted the stock, and, so far as Havens, or his alienees, with the means of notice, are concerned, they are to be treated as a commodity, as well by the express provisions of the articles as by the implied conditions of the contract. By these, it was stipulated that the estate on hand should be sold at the expiration of the partnership, and that the cash and securities, after payment of the debts, should be divided among the shareholders '*pro rata*, according to their respective shares of the stock.' Now, what was the nature of the shares in the mean time? Havens did not own even a twentieth part of the land jointly or severally. In *Allison v. Wilson's Executors*, 13 Serg. & Rawle, 330, and *Morrow v. Brenizer*, 2 Id. 188, it was ruled, that where a party is entitled merely to the proceeds of land when sold, he has no estate in the realty which can be bound by a judgment, or sold on an execution against him. The present is a stronger case; for so to interpret such a contract as to allow each member of the company to have a specific interest in the lands which might be clogged by the liens or attachment of his separate creditors, would defeat the very end of the association. I grant that a sale on a judgment against the com-

pany by a partnership creditor, would pass its lands, no matter whether as such or as chattels; but by no device can a separate creditor of a partner take any part of his share out of the capital stock and apply it to the satisfaction of his debt, or sell anything but his contingent share of the profits and stock at the settlement of the partnership account; and, as that is personalty, it cannot be bound by a judgment. A glance at the facts of the case will show an attempt by the plaintiffs to do so at the expense of a party standing in the place of the company; and it must not succeed."

A similar view was taken in *Ludlow v. Cooper*, and the purchase of land by a firm, for the purpose of being re-sold on their joint account, held to render it personal property, for the purposes of descent and distribution to, and among those claiming under the partners individually, as well as between the partners themselves. There can be no doubt, that until the debts due by the firm, and the mutual claims of the partners, are

fully paid and satisfied, real estate may be treated by equity as if it were personal, but it does not necessarily follow, that the character of personalty should be ascribed to the surplus which may remain after the partnership equities are at an end, and when the question arises between the heirs or devisees of the individual partners; *Ludlow v. Cooper*; *Goodburn v. Stevens*, 1 Maryland Ch.; *Pierce v. Trigg*, 10 Leigh, 406; *Hale v. Plummer*, 6 Indiana, 121. Most of the cases in this country, perhaps all, may be reconciled by the aid of this distinction, and of that which exists between the effect of the mere purchase of land, as partnership property, and of an express or implied agreement, that it shall be viewed as a commodity, and sold for the benefit of the partnership. Thus, in *Roberts v. M'Carty*, 9 Indiana, 16, the court spoke of the land as being absolutely personalty, but the decision was limited to treating its true character of realty, as subordinate to the exigencies of the equities of the firm.

RESULTING TRUST.

*DYER v. DYER.

[*165]

NOV. 20, 21, AND 27, 1788. IN THE EXCHEQUER, BEFORE LORD CHIEF BARON EYRE, BARON HOTHAM, BARON THOMPSON.

REPORTED 2 COX, 92.¹

PURCHASE IN THE NAME OF A SON.—ADVANCEMENT.]—*Copyhold granted to A. and B. his wife, and C. his younger son, to take in succession for their lives and the life of the survivor. The purchase-money was all paid*

¹ S. C., 1 Watk. Cop. 216.

by A. C. is not a trustee of his life-interest for A.; but takes it beneficially as an advancement from his father.—Resulting trust.

IN 1737, certain copyhold premises, holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer, (the plaintiff's father,) and Mary his wife, and the defendant William his other son, to take in succession for their lives and to the longest liver of them. The purchase-money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son.

The present bill stated these circumstances, and insisted that the whole purchase-money, being paid by the father, although by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

[*166] The defendant insisted that the insertion of his name *in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by Mr. *Solicitor-General* and *Ainge*, for the plaintiff; and by *Burton* and *Morris* for the defendant. The following cases were cited, and very particularly commented on:—*Smith v. Baker*, 1 Atk. 385; *Taylor v. Taylor*, 1 Atk. 386; *Mumma v. Mumma*, 2 Vern. 19; *Howe v. Howe*, 1 Vern. 415; *Anon.*, 2 Freem. 123; *Benger v. Drew*, 1 P. Wms. 781; *Dickenson v. Shaw*, before the Lords Commissioners, in 1770; *Bedwell v. Froome*, before Sir T. Sewell, on the 10th of May, 1778; *Row v. Bowden*, before Sir L. Kenyon, sitting for the Lord Chancellor; *Crisp v. Pratt*, Cro. Car. 549; *Scroope v. Scroope*, 1 Ch. Ca. 27; *Elliot v. Elliot*, 2 Ch. Ca. 231; *Ebrand v. Dancer*, 2 Ch. Ca. 26; *Kingdon v. Bridges*, 2 Vern. 67; *Beck v. Andrew*, 2 Vern. 120; *Rundle v. Rundle*, 2 Vern. 264; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Stileman v. Ashdown*, 2 Atk. 477; *Pole v. Pole*, 1 Ves. 76.

LORD CHIEF BARON EYRE, after directing the cause to stand over for a few days, delivered the judgment of the Court.

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause; and I then indeed entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in

as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case, in addition to those cited, which is that of *Rumboll v. Rumboll*,¹ on the 20th of April, 1761.

*The clear result of all the cases, without a single exception, is, that *the trust of a legal estate, whether freehold, copyhold, or leasehold; [*167] whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money.* This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence.

The cases go one step further, and prove that *the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust*; and it has been determined in so many cases, that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides.

In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this *shows that the father intended an advancement; and, therefore, the resulting trust is rebutted; but [*168] then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord Nottingham² could not get over this; and he ruled, that in such a case the resulting trust was not rebutted; and in *Pole v. Pole*, 1 Ves. 76, Lord Hardwicke thought so too; and yet the rule, in a court of equity, as recognized in other cases, is, that the father is the only judge as to the quantum of a son's provision; that distinction, therefore, of the son being provided for or not is not very solidly taken or uniformly adhered to.³ It is

¹ Since reported 2 Eden, 15.

² *Grey v. Grey*, 2 Swanst. 600; S. C., Finch, 343; and see *Elliot v. Elliot*, 2 Ch. Ca. 231; *Loyd v. Read*, 1 P. Wms. 608.

³ See *Redington v. Redington*, 3 Ridg. 190; *Sidmouth v. Sidmouth*, 2 Beav. 456.

then said, that *a purchase in the name of a son is a prima facie advancement*, (and, indeed, it seems difficult to put it in any other way.) In some of the cases, some circumstances have appeared which go pretty much against that presumption: as where the father has entered and kept possession and taken the rents, or where he has surrendered or devised the estate, or where the son has given receipts in the name of the father; the answer given is, that the father took the rents as guardian of his son. Now, would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered, that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son, being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me.

In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be, that the first taker might surrender the whole lease, that shall make [*169] the other lessees trustees for him; but this custom *operates on the legal estate, not on the equitable interest; and therefore, this is not a very solid argument. When the lessees are to take *successive*, it is said, that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and, to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea: to be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to lives in succession, the inference is very different. These are difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted, that the case of *Dickenson v. Shaw* is a case very strong to support the present plaintiff's claim. That came on in Chancery on the 22nd of May, 1770. A copyhold was granted to three lives to take in succession, the father, son, and daughter; the father paid the fine; there was no custom stated; the question was, whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine, and the daughter seven years old. It appeared that the father had leased the premises from three years to the extent of nine years. On this case, Lords Commissioners Smythe and Aston

were of opinion that, as the father had paid the purchase-money, the children were trustees for him. To the note I have of this case it is added, that this determination was contrary to the general opinion of the bar, and also to a case of **Taylor v. Alston* in this court. In *Dickenson v. Shaw* there was [170] some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father; if that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the Court was, that the burthen of proof lay on the child; and that the cases, which went the other way, were only those in which the estate was entirely purchased in the names of the children; if so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favored with a note of *Rumboll v. Rumboll*¹ before Lord Keeper Henley on the 20th of April, 1761, where a copyhold was taken for three lives in succession, the father and two sons; the father paid the fine; and the custom was, that the first taker might dispose of the whole estate, (and his Lordship then stated that case fully.) Now, this case does not amount to more than an opinion of Lord Keeper Henley; but he agreed with me in considering a child as a *purchaser* for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor v. Alston* in this court denied the authority of *Dickenson v. Shaw*. That cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron Burland, and was the case of an uncle purchasing in the names of himself and a nephew and niece: it was decided in favor of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides; and the equity on the side of the nominees was thought to preponderate. Lord Kenyon was in that cause, and his argument went solely on the weight of the parol evidence; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favor of a trust; however, the Court determined the other way on the parol evidence: that case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to **be* materially applicable to [171] this, (*Bedwell v. Froome*, before Sir T. Sewell;) but that was materially distinguishable from the present: as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honor there held, that the copyholds were part of the testator's personal estate, for that it was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself; there could be no question about her being a trustee; for it was as a freehold in him for his daughter's life; but, in the course of the argument, his Honor stated the common principles as applied to the present case; and ended by saying that, as *between father and child the natural presumption was that a provision was meant*. The anonymous case

¹ 2 Eden, 15.

in 2 Freem. 123, corresponds very much with the doctrine laid down by Sir T. Sewell; and it observes, that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdon v. Bridges* is a strong case to this point: that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds, where the grant is to take *successive*: *Rundle v. Rundle*, 2 Vern. 264, which was a case perfectly clear; *Benger v. Drew*, 1 P. Wms. 781, where the purchase was made partly with the wife's money; and *Smith v. Baker*, 1 Atk. 385, where the general doctrine, as applied to strangers, was recognized; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular case, *Dickenson v. Shaw* is the only case quite in point; and then the question is, whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its principles, [*172] *they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must show that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended; and I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only. Yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a land-mark, and which, whether right or wrong, should be carried throughout.

This bill must therefore be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

Dyer v. Dyer is a leading case on the doctrine of resulting trusts upon purchases made in the names of strangers, but more especially on the very important exception to the doctrine where purchases are made, not in the names of strangers, but of children or persons equally favored.

As to purchases made in the names of strangers, the Lord Chief Baron Eyre in his judgment observes, "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others *jointly, or in the names of others without that of the purchaser; [*173] whether in one name or several, whether jointly or successive, results to the man who advances the purchase-money; and it goes on a strict analogy to the rule of common law, that, where a feoffment is made without consideration, the use results to the feoffor."

To illustrate this statement of the doctrine, suppose A. advances the purchase-money of a freehold, copyhold, or leasehold estate, and a conveyance, surrender, or assignment of the legal interest in it is made either to B. or to B. and C., or to A., B., and C. jointly, or to A., B., and C. successively. In all these cases, if B. and C. are strangers, a trust will result in favor of A. That a trust results where the conveyance is taken in one name or several jointly, see *Ex parte Houghton*, 17 Ves. 253; *Rider v. Kidder*, 10 Ves. 367; or successive, see *Howe v. Howe*, 1 Vern. 415; *Withers v. Withers*, Amb. 151; *Smith v. Baker*, 1 Atk. 385; and a custom of a manor that a nominee should take beneficially will not hold good, as being unreasonable and contrary to the principles of resulting trusts; *Lewis v. Lane*, 2 My. & K. 449, overruling *Edwards v. Fidel*, 3 Madd. 237.

The doctrine is applicable to personal as well as to real estate; and a trust will result for the person advancing the consideration-money who takes a bond or a transfer of stock, or who purchases an annuity or any other thing of a personal nature in the name of a stranger: see *Ebrand v. Dancer*, 2 Ch. Ca. 26; *Mortimer v. Davies*, cited *Rider v. Kidder*, 10 Ves. 365, 366; *Loyd v. Read*, 1 P. Wms. 607; *Ex parte Houghton*, 17 Ves. 253; *Sidmouth v. Sidmouth*, 2 Beav. 454.

The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly. Lord Hardwicke, indeed, in *Crop v. Norton*, Barnard. C. Rep. 184, S. C., 9 Mod. 235, is said to have thought that it was confined to cases where the whole consideration moved from one person. However, in *Wray v. Steele*, 2 V. & B. 388, Sir Thomas Plumer, V. C., upon the general principle, decided that there was a resulting trust upon a joint advance, where the purchase was taken in the name of one. "Lord Hardwicke," observed his Honor, "could not have used the language ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?"

Where a policy is effected by a person on the life of another, in which he claims an interest to the extent of the policy, such policy will prima facie be assumed to be the property of the person who effected it, and the mere fact that some of the premiums were paid by the person whose life was insured, will *not rebut the presumption. *Triston v. Hardey*, 14 Beav. 232. [*174]

But no trust will result if the policy of an Act of Parliament would be thereby be defeated. Thus, no trust, will result in favor of a person

advancing the purchase-money of a ship registered in the name of another ; for the register, according to the policy of the Registry Acts, is conclusive evidence of ownership, both at law and in equity. "The Registry Acts," says Lord Eldon, "were drawn upon this policy ; that it is for the public interest to secure evidence of the title to a ship, from her origin to the moment in which you look back to her history ; how far throughout her existence she has been British built and British owned ; and it is obvious, that, if where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these acts may be defeated : " *Ex parte Yallop*, 15 Ves. 68 ; see also *Ex parte Houghton*, 17 Ves. 251 ; *Slater v. Willis*, 1 Beav. 354. See and consider *Armstrong v. Armstrong*, 21 Beav. 71, 78. See the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104,) whereby, after enacting that not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship, it is provided, "but this rule shall not affect the beneficial title of any number of persons or of any company represented by or claiming under or through any registered owner or joint owner." Sect. 37 (2).

The principle upon which these cases proceed seems to have been lost sight of in the case of *Field v. Lonsdale*, (13 Beav. 78.) There a person having deposited moneys in his own name in a savings bank to the full extent allowed by act of Parliament, (9 Geo. 4, c. 92,) made further deposits to an account in his own name "in trust for" his sister, but no notice of the investment was given to her. By the terms of the Act he retained a control over the whole fund. It was held by Lord Langdale, M. R., on the death of the depositor, that his sister was not entitled. "I think," said his Lordship, "that the only intention was to *evade* the provisions of the Act of Parliament, and not to create a trust. The declaration is therefore ineffectual, and the claim must be dismissed."

A trust will not, it seems, result in favor of a person who has purchased an estate in the name of another in order to give him a vote in electing a member of Parliament : *Groves v. Groves*, 3 Y. & J. 163 ; see 175.

If the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and even if it is stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made. Thus, in *Sir John Peachy's case*, Rolls, E. T., 1759, MS., Sugd. V. & P. 910, 11th edit., *Sir Thomas Clarke, M. R., laid it down, [*175] that if A. sold an estate to C., and the consideration was expressed to be paid by B., and the conveyance made to B., the Court would allow parol evidence to prove the money paid by C. ; see also *Ryall v. Ryall*, 1 Atk. 59 ; S. C., Amb. 413 ; *Willis v. Willis*, 2 Atk. 71 ; *Bartlett v. Rickersgill*, 1 Eden, 516 ; *Lane v. Dighton*, Amb. 409 ; *Groves v. Groves*, 3 Y. & J. 163. We may, therefore, consider that these authorities overrule *Kirk v. Webb*, Prec. Ch. 84 ; *Heron v. Heron*, Prec. Ch. 163, and other older cases in which it was held that parol evidence could not be admitted to prove payment of purchase-money, so as to raise a resulting trust, on the ground, that the admission of such evidence would be contrary to the Statute of Frauds : for the

trust, which results to the person paying the purchase-money and taking a conveyance in the name of another, is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute. See 29 Car. 2, c. 3, s. 8.

Where the trust does not arise on the face of the deed itself, the parol evidence must prove the fact of the advance of the purchase-money very clearly: *Newton v. Preston*, Prec. Ch. 103; *Gascoigne v. Thwing*, 1 Vern. 366; *Willis v. Willis*, 2 Atk. 71; *Goodright v. Hodges*, 1 Watk. Cop. 229; *Groves v. Groves*, 3 Y. & J. 163. Lord Hardwicke, however, in *Willis v. Willis*, 2 Atk. 72, thought that parol evidence might be admitted to show the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which made it impossible for him to be purchaser. See also, *Lench v. Lench*, 10 Ves. 518.

It is said by Mr. Sanders, in his Treatise on Uses and Trusts, Vol. I., p. 354, 5th edit., "that, after the death of the supposed nominal purchaser, parol proof can in no instance be admitted against the express declaration of the deed." The same opinion is expressed by another author. See Roberts on Frauds, 99, and *Chalk v. Danvers*, 1 Ch. Ca. 310. It does not, however, appear that the Statute of Frauds is violated by admitting parol proof of the advance of the purchase-money after the death of the nominal purchaser, any more than it is by allowing such proof in his lifetime. See *Lench v. Lench*, 10 Ves. 511, 517; Sugd. V. and P. 910, 11th edit.

If the nominal purchaser admits the payment of the purchase-money by the real purchaser, a trust will doubtless result; *Ryall v. Ryall*, 1 Atk. 58; *Lane v. Dighton*, Amb. 413; and even although he, by answer to a bill, denies such payment, parol evidence is, it appears, admissible in contradiction to it. See *Gascoigne v. Thwing*, 1 Vern. 366; *Newton v. Preston*, Prec. Ch. 103; *Bartlett v. Pickersgill*, 1 Eden, 515, 516; *Edwards v. Pike*, *1 Eden, [*176] 267; sed vide *Skett v. Whitmore*, 2 Freem. 280.

But parol evidence has been held not admissible to prove a verbal agreement of an agent to purchase an estate for his principal, where the agent having purchased the estate for himself, *with his own money*, had, by his answer, denied the agreement. See *Bartlett v. Pickersgill*, 1 Eden, 515, where Lord Keeper Henley, clearly drawing the distinction between the admission of evidence to prove the advance of purchase-money, where the trusts result by operation of the law, and are exempted from the Statute of Frauds, and the admission of parol evidence to prove an agreement, said, that to allow parol evidence in the latter case would be to overturn the statute. "The statute," observes his Lordship, "says that there shall be no trust of land unless by memorandum in writing, *except such trusts as arise by operation of law*. Where money is actually paid, there the trust arises from the payment of the money, and *not from any agreement of the parties*. But this is not like the case of money paid by one man, and the conveyance taken in the name of another; in that case, the bill charges that the estate was bought with the plaintiff's money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not; if it was not lent,

the plaintiff bought the land: but as *here the trust depends on the agreement*, if I establish the one by parol, I establish the other also. . . . *If the plaintiff had paid any part of the purchase-money, it would have been a reason for me to admit the evidence.*" The defendant in this case was afterwards convicted of perjury for having denied the trust; but the record of the conviction was held not to be evidence of the agreement: *Bartlett v. Pickersgill*, 1 Eden, 517; see *Chadwick v. Maden*, 9 Hare, 188.

Parol evidence is admissible to prove that a purchase has been made with trust-money; and upon that being proved a trust will result in favor of the cestui que trust, the real owner of the money. Thus, Sir William Grant, M. R., in *Lench v. Lench*, 10 Ves. 517, speaking of a purchase alleged to have been made with trust-money, says, "all depends upon the proof of the fact; for, whatever doubts may have been formerly entertained upon this subject, it is now settled that money may, in this manner, be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence." See also *Anon.*, Sel. Ch. Ca. 57; *Ryall v. Ryall*, 1 Atk. 59; S. C., Amb. 413; *Lane v. Dighton*, Amb. 409; *Balgney v. Hamilton*, cited Amb. 414; *Hughes v. Wells*, 9 Hare, 749; *Harford v. Lloyd*, 20 Beav. 310; *Pennell v. Deffell*, 4 De. G. Mac. & G. 372; *Trench v. Harrison*, 17 Sim. 111.

[*177] No trust will result for a person *who advances the purchase-money merely as a loan: *Bartlett v. Pickersgill*, 1 Eden, 516; *Crop v. Norton*, 9 Mod. 233, 235; *Aveling v. Knipe*, 19 Ves. 445.

Resulting trusts, however, as they arise from equitable presumption, may be rebutted by parol evidence, showing it was the intention of the person who advanced the purchase-money that the person to whom the conveyance was made should take for his own benefit, (*Goodright v. Hodges*, 1 Watk. Cop. 227; S. C., Lofft. 230; *Rider v. Kidder*, 10 Ves. 364; *Rundle v. Rundle*, 2 Vern. 252; see Order, n. (2); *Redington v. Redington*, 3 Ridg. 178; *Deacon v. Colquhoun*, 2 Drew. 21;) and they may be rebutted as to part, and prevail as to the remainder. Thus, where a person has advanced the purchase-money, and has taken a transfer of stock or the conveyance of an estate in the name of a stranger, upon proof of the intention of the person advancing the money to confer upon the nominee a life interest in the stock or estate, the resulting trust will be rebutted as to the life interest, but will prevail as to the remainder: *Lane v. Dighton*, Amb. 409; *Rider v. Kidder*, 10 Ves. 368; *Benbow v. Townsend*, 1 My. & K. 501.

Where there is an express trust declared, though but by parol, there can be no resulting trust; for resulting trusts, though saved by the Statute of Frauds, are only saved and left as they were before the act; and a bare declaration by parol, before the act, would prevent any resulting trust. See *Bellasis v. Compton*, 2 Vern. 294.

Where a person in order to defraud his creditors had transferred stock to a fictitious person, upon proof of the fact, a transfer was ordered to be made to the personal representatives of the transferree, (*Arthur v. Midland Railway Co.*, 3 K. & J. 204;) and in a case where a person had made a similar transfer with the same object, and afterwards became bankrupt, a re-transfer

at the suit of his assignees was ordered to be made into his own name : *Green v. The Bank of England*, 3 Y. & C. 722.

Advancement.—As to purchases made in the names of children, or of persons equally favored, it may be laid down as a general rule that where a purchase is made by a parent in the name of a child, there will *prima facie* be no resulting trust for the parent, but on the contrary, a *presumption arises that an advancement was intended*. “I remember,” says Lord Eldon, “the case of *Dyer v. Dyer*, which was very fully considered; and the Court meant to establish this principle, viz., admitting the clear rule that, where A. purchases in the name of B., A. paying the consideration, B. is a trustee, notwithstanding the Statute of Frauds, that rule does not obtain where the purchase is in the name of a *son; that purchase is an advancement *prima facie*; and in this sense, that this principle of law and presumption is not to be [*178] frittered away by nice refinements. Therefore, if the purchase was of a fee simple immediately, *prima facie* the son would take; so, if it was the purchase of a reversion; and it is very difficult, upon the mere circumstance of the proximity or possible remoteness of possession, to do that away. Nothing could be stronger than the circumstance in *Dyer v. Dyer*, that the purchaser had actually devised it. He certainly took it to be his own; but he happened to mistake the rule:” *Finch v. Finch*, 15 Ves. 50; see also *Franklin v. Franklin*, 1 Swanst. 17, 18; *Grey v. Grey*, 2 Swanst. 597; S. C., *Finch*, 340; *Sidmouth v. Sidmouth*, 2 Beav. 454; *Christy v. Courtenay*, 13 Beav. 96.

The presumption also arises in favor of any person with regard to whom the person advancing the money has placed himself in *loco parentis*: thus in *Beckford v. Beckford*, Lofft, 490, an illegitimate son: in *Ebrand v. Dancer*, 2 Ch. Ca. 26, a grandchild; and in *Currant v. Jago*, 1 Coll. 261, the nephew of a wife, were held entitled to property purchased in their names, from the presumption of *advancement* being intended.

The presumption also arises in favor of a wife: (*Kingdon v. Bridges*, 2 Vern. 67; *Christ's Hospital v. Budgin*, 2 Vern. 683; *Back v. Andrew*, 2 Vern. 120; *Glaister v. Glaister*, 8 Ves. 199; *Rider v. Kidder*, 10 Ves. 367; and *Lorimer v. Lorimer*, 10 Ves. 367, n.; and see *Gosling v. Gosling*, 3 Drew. 335;) and where there is a purchase by a person in the joint names of himself and his wife and child: *Devoy v. Devoy*, 26 L. J. N. S., Ch. 290.

The presumption of advancement also arises in the case of personal as well as of real property. As, for instance, where a person purchases stock, and causes it to be transferred into the name of his son or wife: *Crabb v. Crabb*, 1 My. & K. 511; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Lorimer v. Lorimer*, 10 Ves. 367, n. So, also, in *Ebrand v. Dancer*, 2 Ch. Ca. 23, a grandfather took bonds in the names of his infant grandchildren. The Lord Chancellor, considering that the grandfather was in *loco parentis*, (the father being dead,) said, “The grandchildren are in the immediate care of the grandfather; and if he take bonds in their names, or make leases to them, it shall not be judged a trust, but a provision for the grandchildren, unless it be otherwise declared at the same time;” and decreed accordingly on that reason, though there were other matters.

Many circumstances of evidence have been taken into consideration by different equity Judges, as rebutting the presumption of advancement, which have given rise to many nice distinctions, not very *easy to be understood; most of them, however, are now disregarded. Thus, at one time, it was thought that the *infancy* of a child, in whose name a purchase was made, was a circumstance against its being considered an advancement; it is now, however, considered a strong circumstance in favor of advancement being intended; as in *Lamplugh v. Lamplugh*, 1 P. Wms. 111, where a father made a purchase in the name of an infant eight years old. Lord Cowper held, that "the son, being but eight years old, was unfit for a trustee, and must be intended to be named for his own benefit." See also *Mumma v. Mumma*, 2 Vern. 19; *Finch v. Finch*, 15 Ves. 43. And it is clear, that the argument against advancement being intended, from the circumstance of the property purchased by the parent being reversionary, and therefore not a proper provision for the child, will not prevail, although it has formerly been entertained: *Rumboll v. Rumboll*, 2 Eden, 17; *Finch v. Finch*, 15 Ves. 43; *Murless v. Franklin*, 1 Swanst. 13.

The purchase by a parent, in the *joint names* of himself and his son, has been objected to by Lord Hardwicke, as a weaker case for advancement than a purchase in the name of the son alone: *Pole v. Pole*, 1 Ves. 76; and in *Stileman v. Ashdown*, 2 Atk. 480, he said that it did not answer the purposes of advancement, as it entitled the father to the possession of the whole to a division, besides the father taking a chance to himself of being a survivor of the other moiety; nay, if the son had died during his minority, the father would have been entitled to the whole, by virtue of the survivorship; and the son could not have prevented it by severance, he being an infant. And, moreover, that the father might have other reasons for purchasing in joint-tenancy, namely, to prevent dower upon the estate, and other charges. It seems, however, clear, that, at the present day, the objections of Lord Hardwicke, would have little or no weight; for it has been repeatedly held, both in the old and modern cases, that a purchase by a parent in the joint names of himself and his child, as well as a purchase in the joint names of the child and a stranger, will be held an advancement for the child to the extent of the interest vested in him. See *Scroope v. Scroope*, 1 Ch. Ca. 27; *Back v. Andrew*, 2 Vern. 120; *Grey v. Grey*, 2 Swanst. 599; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Crabb v. Crabb*, 1 My. & K. 511. A stranger, however, taking jointly with the child, must hold the estate vested in him in trust for the parent: *Kingdon v. Bridges*, 2 Vern. 67; *Rumboll v. Rumboll*, 1 Eden, 17.

The principal case, overruling *Shaw v. Dickenson*, decides that a grant of [*180] copyholds, taken by a father in the names of himself *and his sons, will be an advancement for the sons, although, according to the custom of the manor, grants were made for lives successive. See *Murless v. Franklin*, 1 Swanst. 13; *Finch v. Finch*, 15 Ves. 43; *Skeats v. Skeats*, 2 Y. & C. C. 9, decided upon the authority of the principal case.

Another circumstance, which has been considered as an objection against the presumption of advancement, is, that the child has been already *fully*

advanced: in that case, he *may*, it seems, be held a trustee for the father. See *Elliot v. Elliot*, 2 Ch. Ca. 231; *Pole v. Pole*, 1 Ves. 76; *Grey v. Grey*, 2 Swanst. 600; *Loyd v. Read*, 1 P. Wms. 608; *Redington v. Redington*, Ridg. 190. The observation, however, of the Lord Chief Baron, in the principal case, would, at the present day, probably be considered a sufficient answer to such an objection to the presumption of advancement. "The rule of equity," observes his Lordship, "as recognised in other cases, is, that the father is the only judge on the question of a son's provision; and therefore the distinction of the son's being provided for or not, is not very solidly taken." See *Redington v. Redington*, 3 Ridg. 190. And in *Sidmouth v. Sidmouth*, 2 Beav. 456, where it was argued that, as the son was adult, he ought to be considered as provided for, and therefore a trustee for his father, Lord Langdale held that circumstance to be of no weight. "The circumstance," said his Lordship, "that the son was adult, does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred; but, in the relation between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him; and it does not follow, that, because the reason for doing it is not known, there was no intention to advance at all." If a child is advanced but *in part*, no implication against advancement arises: *Redington v. Redington*, 3 Ridg. 106. And a child will not be considered as advanced who has only a reversionary estate: *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

Another circumstance is mentioned in the principal case, as going against the presumption of advancement, viz, the father's entering into, and keeping possession, and taking the rents and profits of the purchased property, or the son's giving receipts in the name of the father: in such case, if the son is an *infant*, the presumption of advancement will not be rebutted, as the acts of the father, it is said, may be referable to his duty as guardian of his son, *and not to an assumption of ownership: *Loyd v. Read*, 1 P. Wms. 608; *Mumma v. Mumma*, 2 Vern. 19; *Alleyne v. Alleyne*, 2 J. & L. [*181] 544; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Stileman v. Ashdown*, 2 Atk. 580; *Taylor v. Taylor*, 1 Atk. 386; *Gorge's case*, cited 2 Swanst. 600; and see *Devoy v. Devoy*, 26 L. J. N. S., Ch. 390.

The Lord Chief Baron, however, in the principal case, expressed himself dissatisfied with the reasoning which refers those acts of the father to his guardianship; and in *Grey v. Grey*, 2 Swanst. 600, Lord Nottingham observed, that, "plainly, the reason of the resolution stands not upon the guardianship, but upon the presumptive advancement."

Even where the son is *adult*, it seems that similar acts of ownership by the father will not prevent the presumption of advancement from arising, especially where the son is *advanced but in part*. A leading authority on this subject is *Grey v. Grey*, 2 Swanst. 299; S. C., Finch, 338. In that case the father received the profits of the estate purchased in the name of his son for twenty years, made leases, took fines, inclosed part of the estate in a park,

built much, and provided materials for more buildings, gave directions for a settlement, and treated for a sale of the estate, yet, after all this, it was decided by Lord Nottingham, after much consideration, that the purchase by the father in the son's name was an advancement. "In all cases whatsoever," said his Lordship, "where a trust shall be between father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain, and coherent, and binding evidence, and not by any argument or inference from the father's continuing in possession and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is *advanced but in part*; and if such inference shall not be made from the father's perception of profits, it shall never be made from any words between them in common discourse; for, in those, there may be great variety and sometimes apparent contradiction. Therefore, where the proof is not clear and manifest, the Court ought to follow the law, and it is very safe so to do:" Finch, 340; see, however, *Murless v. Franklin*, 1 Swanst. 171. Upon the same principle, in *Sidmouth v. Sidmouth*, 2 Beav. 447, where moneys were invested in the funds by a father in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from his son, it was held, after his death, that this was an advancement, and that the funds belonged to the son.

Where, however, a son is *fully advanced*, the father's entering into possession, and into the receipt of the rents or profits of property purchased in his son's name, *may* be *considered as evidence of a trust. See *Grey v. Grey*, 2 Swanst. 600. [*182]

The presumption of advancement may be rebutted by evidence of facts showing the father's intention that the son should take property, purchased in his name, as a trustee, and not for his own benefit. Such facts, however, must have taken place antecedently to, or contemporaneously with, the purchase, or else immediately after it, so as to form, in fact, part of the same transaction, (*Grey v. Grey*, 2 Swanst. 594; *Redington v. Redington*, 3 Ridg. 106, 177, 194; *Murless v. Franklin*, 1 Swanst. 17, 19; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Scawin v. Scawin*, 1 Y. & C. C. C. 65; *Prankerd v. Prankerd*, 1 S. & S. 1; *Cristy v. Courtenay*, 13 Beav. 26; *Collinson v. Collinson*, 3 De G. Mac. & G. 409 :) but subsequently facts will not be admissible in evidence to show the intention of the father against the presumption of advancement. Thus, a devise of the property, as in the principal case, (*Mumma v. Mumma*, 2 Vern. 19; *Crabb v. Crabb*, 1 My. & K. 511; *Skeats v. Skeats*, 2 Y. & C. C. C. 9,) or a mortgage, (*Back v. Andrew*, 2 Vern. 110,) or a demise of copyholds by a license obtained *subsequently* to the purchase in the name of the child, (*Murless v. Franklin*, 1 Swanst. 13,) will be ineffectual: *secus*, where the license to lease is obtained, or a surrender to the use of a will is made at the same court as the grant: *Swift v. Davis*, 8 East, 354, n.; *Prankerd v. Prankerd*, 1 S. & S. 1.

The presumption of advancement may also be rebutted by evidence of parol declarations of the father contemporaneous with, but not by any of his declarations made subsequent to, the purchase: *Elliot v. Elliot*, 2 Ch. Ca. 231;

Woodman v. Morrell, 2 Freem. 33; *Birch v. Blagrave*, Amb. 266; *Finch v. Finch*, 15 Ves. 51; *Redington v. Redington*, 3 Ridg. 106; *Sidmouth v. Sidmouth*, 2 Beav. 456. But where a person had transferred stock into the joint names of himself, wife, and child, and had regularly received the dividends; Sir J. Stuart, V. C., some years after the transfer, received the evidence of the husband and wife as to his intention at the time of the transfer, in order to repel the presumption of advancement: *Devoy v. Devoy*, 26 L. J. N. S., Ch. 290; 3 Jur. N. S. 79; see also *Stone v. Stone*, 3 Jur. N. S. 708.

A fortiori, parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption: *Lamplugh v. Lamplugh*, 1 P. Wms. 113; *Redington v. Redington*, 3 Ridg. 182, 195; *Taylor v. Taylor*, 1 Atk. 386.

The acts and declarations of the father subsequent to the *purchase [*183] may be used in evidence against him by the son, although they could not, as we have before seen, be used by the father against the son: (*Redington v. Redington*, 3 Ridg. 195, 197; *Sidmouth v. Sidmouth*, 2 Beav. 455;) and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father where there is nothing showing the intention of the father, at the time of the purchase, sufficient to counteract the effect of those declarations: *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 Y. & C. C. C. 65; *Pole v. Pole*, 1 Ves. 76; see, however, *Murless v. Franklin*, 1 Swanst. 20.

Evidence, however, will not be admissible to rebut the presumption of advancement where the object of the evidence is to show that the person who made the transfer intended it to take effect in fraud of the law. See *Childers v. Childers*, 3 K. & J. 310; there a father conveyed by registered deed 900 acres of land in the Bedford Level to his son in order to make him eligible as a bailiff. The son shortly afterwards died, without being aware of the conveyance; and without having been elected bailiff. It was held by Sir W. Page Wood, V. C., that the gift was irrevocable, and that the heir of the son was entitled to it for his own benefit. "I cannot," said his Honor, "allow the plaintiff to say, 'I intended this deed to operate in fraud of the law.'" Upon the discovery of fresh evidence in this case the order of the Vice Chancellor was discharged, and leave was given to amend the bill. See 5 W. R. 793, L. J.

As to the presumption of advancement of a wife being rebutted on a purchase by a husband of stock in the joint names of himself and his wife, see *Smith v. Warde*, 15 Sim. 56, and *Hoyes v. Kindersley*, 2 Sm. & Giff. 195.

In the case of an advancement, where part of the purchase-money remains unpaid, it will be a debt payable by the assets of the father: *Redington v. Redington*, 3 Ridg. 106, 201.

Where an advancement is made by a person largely indebted at the time, it will be void under the 13 Eliz. c. 5, as against his creditors: *Christy v. Courtenay*, 13 Beav. 96, 101; *Barrack v. McCulloch*, 3 K. & J. 110.

And where the relation of client and solicitor subsists between the parent and child, the ordinary presumption in favor of the transaction being a gift,

will be excluded, and the burden of proof, as to its validity, will be thrown upon the son acting as solicitor; *Garrett v. Wilkinson*, 2 De G. & Sm. 244.

It is well settled in this country, under statutes similar to the English Statute of Frauds, that if a person purchases an estate with his own money, and the deed is taken in the name of another, the trust of the land results, by presumption or implication of law, and without any agreement, to him who advances the money; and the case is the same where the contract of purchase is made by the *cestui que trust* personally, and where it is made through the nominal grantee as his agent: such trusts are not within the statute, and may be established by parol, notwithstanding the deed acknowledges the consideration to have been paid by the nominal grantee; *Jackson v. Sternbergh*, 1 Johnson's Cases, 153, 155; S. C., 1 Johnson, 45 n.; *Foote v. Colvin*, 3 Id. 216, 221; *Jackson v. Matsdorf*, 11 Id. 91, 96; *Jackson v. Mills*, 13 Id. 463; *Jackson v. Seelye*, 16 Id. 107, 199; *For-syth v. Clark*, 3 Wendell, 638, 650; *Guthrie v. Gardner*, 19 Id. 414; *Boyd v. McLean*, 1 Johnson's Chancery, 582, 586; *Botsford v. Burr*, 2 Id. 405, 409; *White v. Carpenter*, 2 Paige, 218, 238; *Kellogg v. Wood*, 4 Id. 579, 580; *Partridge v. Havens*, 10 Id. 618, 626; *Lowersbury v. Purdy*, 16 Barbour, 376; *Farunger v. Ramsay*, 2 Maryland, 365; *Williams v. Brown*, 14 Illinois, 200; *Nichols v. Thornton*, 16 Id. 113; *Lloyd v. Carter*, 5 Harris, 216; *Curd v. The Lancaster Bank*, Ohio State R. 1; *Williams v. Van Tuyl*, 2 Ohio N. S. 336; *Barron v. Barron*, 24 Vermont, 375; *Peabody v. Tarbill*, 2 Cushing, 236; *Lynch v. Cox*, 11 Id. 265; *Cagle v.*

McCallum, 27 Alabama, 461; *Beck v. Graybill*, 4 Casey, 66; *Kisler v. Kisler*, 2 Watts, 323, 324; *Jackman v. Ringland*, 4 Watts & Sergeant, 149, 150; *Page v. Page*, 8 New Hampshire, 187, 195; *Buck v. Pike*, 2 Fairfield, 9, 23; *Baker v. Vining*, 30 Maine, 121, 125; *Dorsey et al. v. Clarke et al.*, 4 Harris & Johnson, 551, 556; *Neale v. Hagthorp*, 3 Bland, 551, 584; *Perry et al. v. Head et al.*, 1 Marshall, 46, 47; *Chapline's Adm'r v. McAfee, &c.*, 3 J. J. Marshall, 513, 515; *Letcher v. Letcher's Heirs*, 4 Id. 590, 592; *Jenison v. Graves*, 2 Blackford, 441, 447; *Elliott v. Armstrong*, Id. 199, 207; *Runnels v. Jackson*, 1 Howard's Mississippi, 358; *Powell v. Powell*, 1 Freeman, 134; *Talliaferro v. The Heirs of Talliaferro*, 6 Alabama, 404, 406; *Anderson & Bro's v. Jones et al.*, 10 Id. 401, 420; *Smitheal v. Gray*, 1 Humphreys, 491, 496; *Ensley et als. v. Valentine et als.*, 4 Id. 233, 234; *Thomas v. Walker*, 6 Id. 93, 95; *Peabody & Another v. Tarbill*, 2 Cushing, 227, 232; *Long v. Steiger*, Texas, 460. "The substance of the cases on this subject," said the court in *Newells v. Morgan et al.*, 2 Harrington, 225, 230, in the language of the principal case, "appears to be, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the purchase-money; and this in

analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor." The trust will revert to the source and origin of the consideration, whatever may be its character or nature; and hence land set off or taken in payment of a judgment, held in trust for another, will belong in equity to the latter, and not to the person by whom the judgment is recovered, or who appears on the record as its owner; *Peabody v. Tarbill*, 2 Cushing, 236.

It may be considered also as settled in this country, that a resulting trust may be established upon parol evidence against the answer of the grantee denying the trust; but the evidence must be full, clear, and satisfactory; *Boyd v. M'Lean*, 1 Johnson's Chancery, 582, 586; *Elliott v. Armstrong*, 2 Blackford, 199, 209; *Jenison v. Graves*, Id. 441, 447; *Blair v. Bass*, 4 Id. 540, 545; *Snelling v. Utterback, &c.*, 1 Bibb, 609, 610; *Larkins v. Rhodes*, 5 Porter, 196, 207; *Enos et al. v. Hunter*, 4 Gilman, 211, 218; *Smith et al. v. Sackett et al.*, 5 Gilman, 544; *Page v. Page*, 8 New Hampshire, 187, 195; *Buck v. Pike*, 2 Fairfield, 9, 24; *Baker v. Vining*, 30 Maine, 121, 126. There is no doubt, also, that, here, such a trust may be set up after the death of the nominal purchaser: see *Freeman v. Kelly*, 1 Hoffman, 90, 98. A resulting trust may be established upon the parol declarations or acknowledgments of the person in whose name the conveyance is taken, that another paid the purchase-money, which will be evidence against himself, and against those claiming under him by descent, or otherwise than as *bona fide* purchasers for value; and

though such evidence is admitted to be most unsatisfactory, on account of the facility with which it may be fabricated, and the impossibility of contradicting it, and the total alteration of the effect which the slightest mistake or failure of recollection may cause, yet, under strict caution, it is competent ground for a decree, and if plain and consistent, and especially if corroborated by circumstances, may be sufficient; *Malin v. Malin*, 1 Wendell, 626, 648, 649, 652, 653; *Harder v. Harder*, 2 Sandford, 17, 21, 22; and see *Smith v. Burnham*, 3 Sumner, 435, 438. See *Botsford v. Burr*, 2 Johnson's Chancery, 405, 411, 412; *Snelling v. Utterback, &c.*, 1 Bibb, 609, 611. The doctrine of resulting trusts from payment of the purchase-money is admitted to be a very questionable one, and is acted upon, only with great caution, and the circumstances from which such a trust is to be raised, must be clearly proved; *Faringger v. Ramsay*, 4 Maryland Ch. 33; especially if much time has elapsed; *Botsford v. Burr*, 409, 415; *Freeman v. Kelly*, 1 Hoffman, 90, 93, 98; *Jackson v. Moore*, 6 Cowen, 706, 726; *Jackson v. Bateman*, 2 Wendell, 570, 573; *Carey v. Callan's Ex'r, &c.*, 6 B. Monroe, 44, 45; *Baker v. Vining*, 30 Maine, 121, 126. In *Strimpfner v. Roberts*, 6 Harris, 283, the lapse of fifty-one years was held to be a bar, and the court intimated that the same result ought to follow, in every case where the complainant lies by during the period fixed by the Statute of Limitations as a bar to the assertion of a title to land by ejectment, unless there are circumstances which explain and excuse his inaction; and the case of *Faringger v. Ramsay*, would seem to show, that the fact and nature of

the payment must be proved explicitly, and not be a mere inference or deduction, however probable, from the facts and circumstances.

The whole foundation of a resulting trust of this nature, is the payment of the money by the *cestui que trust*, or by the trustee, with funds which are, in equity, the funds of the *cestui que trust*; *Russell v. Allen*, 10 Paige, 249; *The Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Kirkpatrick v. McDonald*, 1 Jones, 393; *Smith v. Burnham*, 3 Sumner, 435. A parol agreement that another shall be interested in the purchase of lands, or a parol declaration by the purchaser that he buys for another, without an advance of money by that other, will not create a resulting trust; *Kisler v. Kisler*, 2 Watts, 323. If a person takes a conveyance of lands in his own name, and pays for them with his own money, parol evidence that he was employed to do this as agent for another, whatever other equity it may raise, will not create a resulting trust of the land by implication of law;¹ and

¹ Whatever the limits of the exception, which withdraws trusts, arising by implication or construction of law from the operation of the statute, may have been formerly, they now extend sufficiently far to embrace every trust growing out of the relations which subsist between the parties, independently of and apart from the agreement or declarations of the person sought to be charged as trustee. Thus, a purchase by an executor, trustee, or agent, in fraud or violation of the duty imposed by his office, or of the confidence reposed in him by the principal, will give rise to a trust, whether, (as the better opinion would seem to be,) the character and nature of the transaction be proved by the testimony of witnesses or by written evidence, *ante*, 221; for, under these circumstances, the trust follows and is deduced by equity from the *res*

therefore, if the party who sets up a resulting trust, made no payment, he cannot show by parol proof that the purchase was made for his benefit, or on his account; *Botsford v. Burr*; *Freeman v. Kelly*; *Lathrop v. Hoyt*, 7 Barbour's S. C. 60, 63; *Smith v. Burnham*, 3 Sumner, 435, 462; *Pinnock v. Clough*, 16 Vermont, 501, 506, 509; *Dorsey et al. v. Clarke et al.*, 4 Harris & Johnson, 551, 557; *Fischli v. Dumaresly*, 3 Marshall, 23; *Thompson v. Branch*, Meigs, 390, 394; *Ensley et als. v. Balentine et als.*, 4 Humphreys, 233, 235; *Peebles v. Reading*, 8 Sergeant & Rawle, 484, 492; *Lynn v. Lynn et al.*, 5 Gilman, 602, 620; or, as it has been frequently expressed in the Pennsylvania deci-

gestæ, not from contract or intention, and the *res gestæ* may always be proved by oral testimony, because, from the nature of things, they can seldom be evidenced in any other way. And it is, perhaps, hardly too much to say, that whenever one man retains or withholds land in fraud of another, whether the fraud be actual or constructive, equity will decree a trust for the latter, the statute being meant to suppress fraud, and not to protect or encourage it; *Jenkins v. Eldridge*, 3 Story, 181, 291; *Morey v. Herrick*, 6 Harris, 125, 128; *Brown v. Dysinger*, 1 Rawle, 408; *Hoge v. Hoge*, Id. 163, 214; 2 Story's Equity Jurisprudence, 68; Hill on Trustees, 91; *post*, note to *Woollam v. Hearn*, vol. 2.

Trusts thus deduced from facts and circumstances, or from the relation in which the parties stand to each other, are perhaps more accurately described as constructive trusts than as trusts by operation of law; Hill on Trustees, 144: although the latter name has also been applied to them by judges of great authority; *Church v. Sterling*, 16 Conn. 388, 401; but however called, they unquestionably have their origin in principles, which are paramount to and independent of the intention of those who are charged with or affected by them.

sions, unless there is something more in the transaction than is implied from the violation of a parol agreement, there is no resulting trust; see *Jackman v. Ringland*, 4 Watts & Sergeant, 149, 150; *Smith v. Smith*, 3 Casey, 180; *Sharp v. Long*, 4 Id. 434; *Walker v. Brenagerd*, 13 Smedes & Marshall, 723, 765, where the cases are collected; and see *Sample v. Coulson*, 9 Watts & Sergeant, 62, 66. Payment or advance of the purchase-money before, or at the time of, the purchase is indispensable; a subsequent payment will not, by relation, attach a trust to the original purchase; for the trust arises out of the circumstance that the money of the real, and not of the nominal purchaser, formed, at the time, the consideration of that purchase, and became converted into land; *Botsford v. Burr*; *Steere v. Steere*, 5 Johnson's Chancery, 1, 19, 20; *Jackson v. Moore*, 6 Cowen, 706, 726; *Freeman v. Kelly*, 1 Hoffman, 90, 93; *White v. Carpenter*, 2 Paige, 218, 238; *Pennock v. Clough*, 16 Vermont, 501, 506; *Page v. Page*, 8 New Hampshire, 187, 196; *Buck v. Pike*, 2 Fairfield, 9, 24; *Conner v. Lewis*, 16 Maine, 268, 274; *Graves v. Dugan*, 6 Dana, 331, 332; *Foster v. The Trustees of the Atheneum*, 3 Alabama, 302, 309; *Wallaces v. Marshall, &c.*, 9 B. Monroe, 148, 155; *Gee v. Gee*, 2 Sneed, 395. "The trust," said Chancellor Kent, in *Botsford v. Burr*, 2 Johnson's Chancery, 405, 414, 415, "must have been coeval with the deeds, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, or the ground of some other relief, but it cannot, by any re-

trospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the Statute of Frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the *cestui que trust*, and the deed not taken in his name. The trust results from the original transaction, at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever. They are governed by different principles, and the doctrine of a resulting trust would be mischievous and dangerous, if we once departed from the simplicity of this rule." "After the legal title has once passed to the grantee by the deed," said another Chancellor, in *Rogers v. Murray*, 3 Paige, 390, 398, "it is impossible to raise a resulting trust so as to divest that legal estate, by the subsequent application of the funds of a third person to the improvement of the property, or to satisfy the unpaid purchase-money. The resulting trust must arise, if at all, at the time of the execution of the conveyance." Accordingly, it has been held that if one of two partners buys in his own name, and gives his own bond and mortgage, and afterwards pays out of partnership funds, a resulting trust will not thereby be created, unless it be unequivocally shown that there was an agreement at the time of the purchase that the funds should be so appropriated; *For-syth v. Clarke*, 3 Wendell, 638, 651.

[A note or other security given by a third party for, and paid afterwards out of the funds of the *cestui que trust*, may, however, be a sufficient payment; *Morey v. Herrick*, 6 Harris, 123; *Lounsbury v. Purdy*, 16 Barbour, 380; and this is equally true of money advanced or loaned to him by a third person; *Gomez v. The Tradesmen's Bank*, 4 Sandford's S. C., 106; *Smith v. Sacket*, 5 Gilman, 534, or even by the person sought to be charged with the trust, because he will be equally entitled to repayment, whether the land rises or falls in value; *Paige v. Paige*, 8 New Hampshire, 187; *Runnels v. Jackson*, 1 Howard, Miss. 358; and may, by an express or implied agreement, have an equitable lien upon it for repayment; *Reeve v. Strawn*, 14 Illinois, 94; *Ferguson v. Sutphen*, 3 Gilman, 547; *Coates v. Woodsworth*, 13 Illinois, 634; *post*, note to *Woollam v. Hearn*, vol. 2. Hence, proof that part of the consideration of a deed to a father, consisted of money belonging to his daughter, and that the rest was paid by him for her benefit, as an advancement, will create a trust in the whole land for the daughter; *Beck v. Graybill*, 4 Casey, 66.]

There is no doubt that payment of part of the purchase-money will create a resulting trust to the extent of that payment; *Botsford v. Burr*, 2 Johnson's Chancery, 405, 410; *Purdy v. Purdy*, 3 Maryland Ch. Decisions, 547; *Bank v. Swazey*, 35 Maine, 81; *Shoemaker v. Smith*, 11 Humph. 81; *Pierce v. Pierce*, 7 B. Monroe, 433; *Duffield v. Wallace*; S. & R. 521; *Morey v. Herrick*, 6 Harris, 123; and a joint advance of money for a purchase, raises a corresponding resulting trust; *Ross v. Hegeman*, 2 Ed-

wards, 373, 375; *Larkins v. Rhodes*, 5 Porter, 196, 200. If a joint deed be made to several who pay unequally, a trust in the land results to each *pro tanto* of the amount paid by each; and where an executory contract of joint purchase was entered into, and separate notes executed to the vendor for the amounts to be paid by each, it was held that an equitable trust arose in favor of each, *pro tanto* of the consideration promised to be paid by each, which chancery, upon full payment, would specifically enforce by decreeing a conveyance accordingly; *Brothers v. Porter et al.*, 6 B. Monroe, 106, 107, 108. See *Bogert v. Perry*, 17 Johnson, 351; *Jackson v. Bate-man*, 2 Wendell, 570, 573. But the amounts paid by the different parties must be shown with certainty; and no case, it was recently said, has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim, and the grantee in the deed, when the consideration is set forth in the deed as moving solely from the latter, when the amount belonging to one and the other is uncertain, and unknown, even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion, which was really the property of each; *Baker v. Vining*, 30 Maine, 121, 127.

The trust which results by implication and operation of law, from the payment of the purchase-money or of a part of it, and without any agreement, is a pure and simple trust of the ownership of the land: it is not an interest in the proceeds of the land, nor a lien upon it for the advance, nor an equity or right to a sum of money to be raised out of it, or upon the security of it. Such rights arise from

special agreements, and are the subjects of express trusts; or where implied, it is from other circumstances than the mere ownership of the purchase-money. There can be no resulting trust of an estate to a particular extent of its value, leaving the residue of its value in the grantee; nor can an estate result to one who pays the consideration, as a pledge or security for its payment: such interests may be created or secured by mortgage, lien, or express trusts. What is known as a resulting trust is a complete trust of original ownership, and it is nothing else. Therefore, to make a partial payment create a resulting trust at all, the money must be paid as a definite aliquot part of the *consideration* of the purchase; and then the trust will be of an aliquot part of the whole estate in the property: but unless the payment or advance be of a definite part of the *consideration* money, as such, no trust will result by implication of law, and without agreement; *White v. Carpenter*, 2 Paige, 218, 238, 239, 240, 241; *Sayre v. Townsend*, 15 Wendell, 647, 650; *Freeman v. Kelly*, 1 Hoffman, 90, 96; *Evans' Estate*, 2 Ashmead, 470, 482; *Smith v. Burnham*, 3 Sumner, 435, 462, 463. [It has, however, been said, that when a purchase is made with funds furnished jointly by two, and there is no sufficient proof of the amount advanced by each, the presumption will be, that the shares of each were equal; *Shoemaker v. Smith*, 11 Humphreys, 81; and it would seem plain, that when the doubt or uncertainty arises from the failure of a buyer who has been acting on behalf of others, to keep accurate accounts, or from his having confused the funds of his prin-

cipals with his own, it should be solved by making every reasonable inference against him, and in favor of those whose remedy is embarrassed by his negligence; *Seaman v. Cook*, 14 Illinois, 36.]

If a trustee, or agent of any description, lay out the money which he holds in his fiduciary character, in the purchase of land, and take the conveyance to himself, the person entitled to the money, may, at his election, charge the trustee personally, or follow the money into the land, and claim the purchase as made in trust for him, and he may establish such a trust by parol evidence; *Duffield v. Wallace*, 2 S. & R. 521; *Kisler v. Kisler*, 2 Watts, 323; *The Harrisburg Bank v. Tyler*, 3 W. & S. 373; *Wilhelm v. Folmer*, 6 Barr, 296; *Kirkpatrick v. McDonald*, 1 Jones, 393; *Oliver v. Pitt*, 3 Howard, 401; *Seaman v. Cook*, 14 Illinois, 301; *Williams v. Hollingsworth*, 1 Strobbart's Eq. 103; *Garrett v. Garrett*, Id. 96; *The Methodist Church v. Jaques*, 1 Johnson, 450; *Moffit v. McDonald*, 11 Humphreys, 437; *Hill on Trustees*, 142, note 1; *Valle v. Bryan*, 19 Missouri, 423; *Neill v. Keese*, 13 Texas, 187; and in like manner, a purchase by one partner with partnership funds, will create a resulting trust in the firm; *Freeman v. Kelly*, 1 Hoffman, 90, 94; *Smith v. Burnham*, 3 Sumner, 435, 462; *Philips et al. v. Cramond et al.*, 2 Washington's C. C. 441, 445; *Turner v. Petigrew et als.*, 6 Humphreys, 438, 439; *Harrisburg Bank v. Tyler*, 3 Watts & Sergeant, 373, 378, *ante*; under such circumstances, the principal, or *cestui que trust*, is entitled to the money or the land, at his option, and may use his hold on the land as the means of

getting the money, which distinguishes this case from those, where the money of one man is invested in the purchase of land, with his consent and approbation, and a deed taken in the name of another, which may give a right to the land, but necessarily precludes all claim to the money; *Lench v. Lench*, 10 Vesey, 511; 17 Id. 58; *Wallace v. Duffield*, 2 S. & R. 521, 529.

A similar result will follow from a purchase by a husband with the proceeds or accumulations of the separate estate of his wife, or with money bequeathed in trust for her benefit, whether the deed is made in his own name or in that of a third person; *The Methodist Church v. Jaques*, 1 Johnson's Ch. 450; 3 Id. 77; *Dickenson v. Codwise*, 1 Sandford's Ch. 214; *Pinney v. Fellows*, 15 Vermont, 325; *Barron v. Barron*, 24 Id. 375; *Lathrop v. Gilbert*, 2 Stockton's Ch. 345; *Lench v. Lench*, 10 Vesey, 511; but not as it would seem from a purchase out of the wife's savings, from money given to her by her husband, or acquired by her own industry, after marriage, unless the circumstances are such as to invest her with a specific ownership of the money, apart from, and before the investment; *Raybold v. Raybold*, 8 Harris, 308; *Merrill v. Smith*, 37 Maine, 394; *Henderson v. Warmack*, 27 Mississippi, 830; although a trust may, no doubt, be raised in favor of the wife, as against a third person, by proof that her husband paid the purchase-money for her benefit, out of his own funds; *Raybold v. Raybold*; *Pinney v. Fellows*; *Farley v. Blood*, 10 Foster, 354.

A resulting trust may, in all cases, be rebutted; and it is well settled, that it may be rebutted by parol evi-

dence, or circumstances. The rule is general, that an equity founded on parol, may be rebutted, put down, or discharged by parol proof; *Myers v. Myers*, 1 Casey, 100. A resulting trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect, not to defeat it. It will not attach in the person paying the purchase-money, if it was not the intention of either party that the estate should vest in him. It will therefore not be raised in opposition to the declaration of the person who advances the money, nor in opposition to the agreement of the parties on which the conveyance is founded, or to the obvious purpose and design of the transaction; *Botsford v. Burr*, 2 Johnson's Chancery, 405, 416; *Steere v. Steere*, 5 Id. 1, 18, 19; *Squire v. Harder*, 1 Paige, 494, 495; *White v. Carpenter*, 2 Id. 218, 265; *Philips et al. v. Cramond et al.*, 2 Washington's C. C. 441, 445; *McGuire et al. v. McGowen et al.*, 4 Dessausure, 487, 491; *Page v. Page*, 8 New Hampshire, 187, 195; *Elliott v. Armstrong*, 2 Blackford, 199, 213; *Sedge v. Morse*, 16 Johnson, 199; nor, if the purpose was a fraudulent one, will it be raised in favor of the person committing the fraud; *Proseus v. McIntyre*, 5 Barbour's S. Ct. 425, 434; *Ford's Ex's, &c. v. Lewis*, 10 B. Monroe, 127. Proof that a resulting trust was intended to defraud or delay creditors, will, therefore, be sufficient to prevent a decree in favor of the complainant; *Baldwin v. Campfield*, 4 Halsted's Ch. 891; both law and equity refusing to interfere as between wrong doers, and leaving each in the position in which his own acts and those of his accomplices have placed

him; *Murphey v. Hubert*, 4 Harris, 50; *Brantley v. West*, 27 Alabama, 542. And the case of *Baldwin v. Campfield* would seem to show that the court will take notice of the fraud, when disclosed by the evidence, although not appearing on the face of the pleadings, nor set up by the respondent. But it is hardly necessary to say, that the creditors may prove the real nature of the transaction, and have a decree for their benefit, as they might in any other case of the fraudulent or voluntary disposition of the property of a debtor; *Kennard v. McRight*, 2 Barr, 38; *Guthrie v. Gardner*, 19 Wend. 414; *Jackson v. Forrest*, 2 Barbour's Ch. 576; *Newett v. Morgan*, 2 Harrington, 225; *Watson v. Le Row*, 6 Barbour, 487; *Rucker v. Abell*, 8 B. Monroe, 566; *Bauskett v. Holsenback*, 2 Richardson, 624.

Moreover, a resulting trust will not be raised in opposition to the law of the land, and therefore not in favor of an alien incapable of holding. The law never casts a legal or equitable estate upon one who has no right or capacity to hold it; therefore, where an alien purchases land and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, a resulting trust will not be raised by operation of law, in favor of the alien who cannot hold the land; *Leggett v. Dubois*, 5 Paige, 114, 117; *Philips v. Cramond*, 2 W. C. C. R. 441. In like manner, no resulting trust can arise in contravention of the language or policy of a statute, as when the purpose is to do that through the medium of a trustee which the *cestui que trust* would not do in his own person; *Alsworth v. Cordby*, 31 Mississippi, 32.

The presumption of a resulting trust is fully rebutted, or no such presumption arises, where a parent advances the purchase-money, and takes the conveyance in the name of his child. A purchase by a father in the name of his son who is not provided for, is presumptively an advancement of the son, and no trust results to the parent; although this presumption may be rebutted; *Partridge v. Havens*, 10 Paige, 618, 626; *Proseus v. McIntyre*, 5 Barbour's S. Ct. 425, 432; *Tremper v. Barton, Jr.*, 18 Ohio, 418, 423; *Butler v. M. Ins. Co. et al.*, 14 Alabama, 777; *Stanley v. Brannon*, 6 Blackford, 194, 195; *Dennison v. Goehring*, 7 Barr, 180, 182, note; *Douglass v. Brien*, 4 Richardson's Eq. 322; *Cartwright v. West*, 4 Illinois, 417; *Shepherd v. White*, 10 Texas, 72; *Alexander v. Warram*, 17 Missouri, 230; *Dudley v. Bosworth*, 10 Humphreys, 12; *Walton v. Divine*, 20 Barbour, 9; *Dyer v. Dyer*, 2 Cox, 92; *Pinney v. Fellows*, 15 Vermont, 525. The same rule was followed in *Baker v. Leathers*, 3 Indiana, 557, and applied to a case where land bought by a father, was conveyed, with his assent, to his daughters. And if an obligation to convey to the father and son is entered into, and the money is paid by the father, this is, presumptively, an advancement of the son to the extent of one half the estate; the equitable estate to that extent accordingly vests in him and descends to his heirs, and if the deed be made to the father, instead of the father and son jointly, the grantee becomes a trustee as to one-half, and may be compelled to convey; *Thompson's Heirs v. Thompson's Devises*, 1 Yerger, 97, 99. A purchase by a husband in the name of his wife is, in

like manner, in the first instance, taken to be an advancement of the wife and not a resulting trust; *Guthrie v. Gardner*, 19 Wendell, 414; *Whitten & others v. Whitten*, 3 Cushing, 194, 197; *Walton v. Divine*, 20 Barbour, 9; *Alexander v. Warram*, 17 Missouri, 228; *Fatheree v. Fletcher*, 31 Mississippi, 265. And the same rule applies in relation to one towards whom the party stands in *loco parentis*, as, a son-in-law; *Baker v. Leathers*, 3 Porter, Indiana, 558, or a nephew who has lived with the uncle as a member of his family. In *Jackson v. Feller*, 2 Wendell, 465, 469, an uncle bought a farm and paid the purchase-money, and took the conveyance in the name of his nephew who had lived with him and worked for him for a long time without other recompense than his clothing; Sutherland, J., said that as a resulting trust may be proved, so it may be rebutted by parol evidence, and he held that declarations by the uncle that he had given the farm to his nephew, and intended it as a provision for him, were sufficient to show that the purchase was a gift and advancement to the nephew.

The presumption of an advancement, from the grantee's being the child or wife of the person who pays the purchase-money, may be rebutted by evidence which shows that the intention of the latter was to secure a trust for himself; *Jackson v. Matsdorf*, 11 Johnson, 91, 96; *Shepherd v. White*, 10 Texas, 72; the question, in such cases, is one entirely of intention; *Proseus v. McIntyre*, 5 Barbour, 425, 432; *Butler v. M. Insurance Co. et al.*, 14 Alabama, 777, 788; and hence proof, it would seem, will be admissible that a conveyance of land bought and paid for by a husband,

was made to his wife under the mistaken impression that it would vest a title in, or operate for the joint use and benefit of both of them; 2 Williams, 638. And if a person indebted, purchases lands with his own money, and takes the conveyance in the name of another, for the purpose of defrauding his creditors, the trust in the land results to him for the benefit of his creditors, and may be taken by them; *Guthrie v. Gardner*, 19 Wendell, 414; *Brown and others v. McDonald*, 1 Hill's Chancery, 297, 306; *Demaree v. Driskill*, 3 Blackford, 115; *Doyle, &c. v. Sleeper, &c.*, 1 Dana, 531, 537; *Hunt and Tucker v. Booth*; *Edwards and Hunt*, 1 Freeman, 215, 217; *Bell v. Hellenback et al.*, Wright, 751; *Newells v. Morgan et al.*, 2 Harrington, 225, 229; *Dewey v. Long*, 25 Vermont, 564: but it seems that a trust will not result for the benefit of the party who has thus attempted a fraud; *Proseus v. McIntyre*, 5 Barbour, 425, 434, *ante*.

The admissibility of parol evidence of intention, in cases where the purchase-money has been paid by another person than the legal grantee, has, undoubtedly, in the American cases, taken a very general and very dangerous range. But the evil seems to be inherent in the practical administration of the original principle of equity, that a trust results presumptively from payment of the purchase-money: and so long as that doctrine is acted upon, it is almost impossible to lay down any general restriction upon the reception of parol evidence, without incurring a risk of doing in some cases great injustice. Lord Chancellor Sugden, indeed, in *Hall v. Hill*, 1 Connor & Lawson, 120, 139, has endeavored to establish a difference between the ad-

mission of such evidence to rebut, and to fortify, an equitable presumption : he suggests that the true general principle of equity is, that parol evidence of intention is admissible to rebut a presumption arising against the apparent intention of the instrument, but not to fortify such a presumption ; that is to say, not to fortify it in the first instance, because, if parol evidence be given to rebut the presumption, no doubt that may be counteracted by other parol evidence in support of the presumption. But it is very difficult to apply that distinction, supposing it to be sound : because, in many instances, it is scarcely possible to say whether the conclusion that would be arrived at upon particular circumstances, is a presumption, or the rebuttal of a presumption. For example, when a purchase is made by a father in the name of a son who has not received any advancement, it is not easy to say whether the inference which would be made upon those facts, of a trust for the son, is the presumption of an advancement, or the rebuttal of a resulting trust. If it is the latter, parol evidence of intention that the son should be a trustee for the father, would, upon Sir E. Sugden's rule, be objectionable, as opposing the deed ; and parol evidence the other way would be still more so, as cumulative upon both the legal construction and the equitable presumption : yet upon the English cases, it is admissible both ways. But the distinction, at least in reference to resulting trusts, seems not to be sound in principle. When the doctrine is once taken up, that the intention of the parties is not to be found in the legal construction of an instrument, and that you are to infer it from extrinsic

circumstances, nothing short of a general admission of all parol evidence that throws light on the intention, and is in its nature competent, can be adopted. The rule in equity certainly is, that until the *fact* of the payment of the purchase-money by another is proved, the interest vests according to the legal operation of the deed : but when that fact is proved, the deed is no longer, in equity, absolutely, the legal determination of the intention of the parties, and that intention must be sought for elsewhere, and, of course, from circumstances in parol. In seeking it, elsewhere, why should the written instrument be suffered to thwart the discovery of that intention, from parol, when it is admitted that that instrument is not the absolute expression of the intention of the parties to the contract ? The ground of a resulting trust is, that payment of the purchase-money is an equity to have the land ; but evidence of intention must often enter into the fact whether that payment is such an equity, under the circumstances. The mere fact of payment may, in some cases, not be sufficient to show a clear presumption of a trust ; yet explained by parol evidence of intention, it might be ; or, the mere fact of payment may, in the evidence of it, be inseparately connected with some other circumstances which tend to rebut the presumption : and in such a case, parol evidence of intention would only be counteracting this rebutting evidence. The original doctrine is probably one of the mistakes of equity : but being admitted, it becomes necessary, both by logical consequence, and in practical justice, to give complete and consistent scope to the evidence which the doctrine sanctions and introduces :

and an attempt to narrow the use of such evidence by arbitrary little rules which are applied out of place, only increases the mischief. When it is once settled that payment of the purchase-money raises an equity and a trust, which override the deed, the practice, in reason and conscience, ought to be, to admit all legal evidence that can explain, define, and determine the equity. See *Baker v. Leathers*, 5 Indiana, 558.

In New York, by the revised statutes, (vol. 1, p. 728, pt. 2, ch. 1, sec. 51,) resulting trusts from payment of the purchase-money are abolished; except (sec. 52) that where a conveyance is taken in the name of another person, it shall be presumed fraudulent as against the creditors at the time of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors, to an extent sufficient to satisfy their demands; and except also (sec. 53) where the grantee has taken the conveyance in his own name without the consent or knowledge of the person paying the consideration, or has purchased the lands in violation of some trust, with moneys belonging to another person; *Turcks v. Alexander*, 11 Paige, 619; *Watson v. Le Row*, 6 Barbour, 481. The creditors of the person furnishing the consideration money can therefore reach the land only by charging fraud; *Bodine v. Edwards*, 10 Paige, 504; and none but creditors existing at the time can avail themselves of such fraud; *Brewster v. Power*, Id. 563, 568: but if a case of such fraud be established, the trust in the land results to the debtor in favor of his creditors, and they may proceed against it at law as an estate in him; *Wait v. Day*,

4 Denio, 439; controlling the dictum in *Brewster v. Power*, 10 Paige, 562, to the contrary. But in the recent case of *Gorfield v. Hatmaker*, 15 New York, R. 475, *Wait v. Day* was overruled, and the only remedy of the creditors, under such circumstances, held to be in equity. A misapplication of trust funds by a purchase in the trustee's name, will, however, give rise to a resulting trust, under these statutes, as it did before; *Russell v. Allen*, 10 Paige, 250.

[The general rule, when a resulting trust is sought to be established, and indeed in all cases, when aid is sought either from law or equity, is, that the *allegata* and *probata* must agree, and that the complainant cannot set forth one case in the pleadings and recover on another as ultimately established by the proofs; *Andrew v. Farnham*, 2 Stockton's Ch. 91; although it would appear that the court may, at their discretion, enforce an equity disclosed by the answer, although different from that alleged in the bill.

A resulting trust arose at common law on a feoffment without consideration, and it has been said, that the same rule should apply to all conveyances under the Statute of Uses, which appear on their face to be voluntary, or for a merely nominal consideration; Story's Equity Jurisprudence, sect. 1197; Cruise's Digest, 402, sect. 37; although the better opinion would seem to be, that such a trust will not arise from the absence of a consideration, without corroborating circumstances, (such as the retention of the deed, the long continued and exclusive possession of the grantor, the absence of the grantee at the time of its execution, and his failure to exercise or act upon the

rights which it purports to confer,) tending to show that there was no intention to make a gift, or pass the beneficial interest in the property conveyed; *Hill on Trustees*, 106; *Cecil v. Butcher*, 2 J. & W. 573; *Sowerby v. Arden*, 1 Johnson's Ch. 240; *Tolar v. Tolar*, 1 Dev. Eq. 456. And however this may be, it would seem well settled, that a deed which purports to be made for a valuable consideration, cannot be shown to be merely voluntary, in order to raise a trust in favor of the grantor; because such evidence is directly at variance not only with the Statute of Frauds, but with the rule that a written instrument cannot be varied by parol evidence; *Leman v. Whitley*, 4 Russell, 323; *Wilkinson v. Wilkinson*, 2 Devereux, Eq. 376; *Rathbone v. Rathbone*, 6 Barb. 93; *Philbrook v. Delano*, 29 Maine, 410; *Squire v. Harder*, 1 Paige, 494; *Graves v. Graves*, 9 Foster, 129. This view of the law is somewhat at variance with the language held by Story, in his Treatise on Equity Jurisprudence, (2 Equity Jurisprudence, 1199,) and in *Jenkins v. Eldridge*, 3 Story, 181, 290; where the case of *Leman v. Whitley* is questioned, and an opinion intimated, that procuring a conveyance for one purpose, and then using it for another, is a fraud, against which equity will relieve, whether the evidence be written or oral, but would seem essential to the certainty and stability of the assurances on which the title to real property depends, and is fully sustained by the recent case of *Balbeck v. Donaldson*,

6 Law Register, 148, where the retention of the conveyance, and of the possession of the property, which it purported to convey, coupled with other circumstances, which raised a strong presumption that the grantee had really paid nothing, and that there was no intention to give her anything in the land, were held insufficient to raise a resulting trust in opposition to the express words of the deed, which purported to have been made for a full and valuable consideration. It has, notwithstanding, been held in Pennsylvania, that the oral declarations of the grantee are admissible in evidence, to show that a deed is voluntary, and subject to a trust for the grantor, in opposition not only to the words of the deed itself,⁶⁴ but of a bond executed at the same time, for the whole amount of the consideration expressed in the deed; *Murphy v. Hubert*, 7 Barr, 420; the ground of the decision being, that the seventh section of the Statute of Frauds not having been re-enacted, trusts might be created by oral declarations, and proved by the testimony of witnesses without the aid of writing. The court, however, seem to have omitted to inquire how there could be a trust if the consideration was valuable, and how the deed could be shown to be merely voluntary, in opposition to its language, and that of the bond, without violating rules of evidence, which were anterior to the Statute of Frauds, and which would remain in full force, if it were repealed; vol. 2, *post*, note to *Wollam v. Hearn*.]

EXECUTION OF POWER.

[*184]

*TOLLETT v. TOLLETT.

DE TERM S. MICHAELIS, 1728.

REPORTED 2 P. WMS. 489.¹

DEFECTIVE EXECUTION OF A POWER AIDED.]—*Husband has a power to make a jointure to his wife by deed: he does it by will, and she has no other provision; equity will make this good. Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or for a wife, or for younger children; so also will it help a defective execution of a power; but not a non-execution.*

THE husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband to make a jointure on his wife by *deed* under his hand and seal.

The husband having a wife, for whom he had made no provision, and being in the Isle of Man, by his last *will*, under his hand and seal, devised part of his lands within his power to his wife for her life.

Objection.—This conveyance, being by a will, is not warranted by the power, which directs that it should be by *deed*; and a will is a voluntary conveyance, and, therefore, not to be aided in a court of equity.

SIR JOSEPH JEKYLL, M. R.—This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for;² and as a Court of Equity would, had this been the case of a copyhold *devised*, have supplied the want of a surrender; so where there is a defective execution of the power, be *it either for payment of debts [*185] or provision for a wife or children unprovided for, I shall equally supply any defect of this nature.

The difference is betwixt a *non-execution* and a *defective execution of a power*; the latter will always be aided in equity, under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the *non-execution* of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

¹ S. C., Mos. 46; 2 Eq. Ca. Ab. 233, pl. 16; 663, pl. 10.

² Equitable relief will be granted, although the wife or child seeking it is provided for. Vide *Kettle v. Townsend*, 1 Salk. 187; *Smith v. Baker*, 1 Atk. 385; *Hervey v. Hervey*, 1 Atk. 568; *Chapman v. Gibson*, 3 Bro. C. C. 229.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

Wherever the formalities required by a power are not strictly complied with, the appointment will, at law, be void, and the property which is the subject of the power will consequently go as in default of appointment. Courts of Equity, however, although not holding the power to be well executed, will, in favor of certain parties, aid the defective execution of a power by compelling, as in the principal case, the person having the legal interest to transfer it in the manner pointed out by the defective appointment. The principle upon which Courts of Equity act in these cases is thus stated by Lord Alvanley, M. R., in the case of *Chapman v. Gibson*, 3 Bro. C. C. 229 : "I have looked," said his Lordship, "at all the cases I can, to find on what principle this Court goes in supplying a defect, and altering the legal right ; it is this : Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir, to make him perfect this intention." In the same case his Lordship remarked, "that the execution of a power, and a surrender of a copyhold, go hand in hand, precisely on the same ground." It may, therefore, be considered as a settled rule, that the Court interposes its aid upon the same principles and under similar circumstances in cases of a want of a surrender of copyholds, *and a defective execution of a power. See also *Rodgers v. Marshall*, [*186] 17 Ves. 297.

Surrenders of copyholds to the use of wills were rendered unnecessary for the future by 55 Geo. 3, c. 192, repealed by 1 Vict. c. 26, which, however, substitutes similar provisions. See sects. 3, 4, and 5.

There seems to be a question, whether equity will supply a surrender of copyholds, in the case of a conveyance of, or a covenant to surrender, copyholds in a deed supported by a merely *meritorious* consideration, in the same manner as in the case of a devise of unsurrendered copyholds by will. In *Rodgers v. Marshall*, 17 Ves. 295, a father by deed, in consideration of the natural love and affection he had for his son, and also in consideration of 200*l.*, (which, however, was not paid, and the deed was therefore voluntary,) granted, bargained, sold, and surrendered unto his son and his heirs certain copyholds ; the father died without having made any surrender, and a bill was filed by the assignees of the son, who had become bankrupt, against the heir-at-law of the father, praying that he might be decreed to surrender the copyholds. Sir Samuel Romilly, for the defendant, contended, that the equity of supplying a surrender was confined to the case of a will. Sir W. Grant, M. R., however, said, "There certainly are cases of supplying the want of surrender upon a *deed*, as well as a *will*, for a younger child, but upon the same principle as in the case of a will or the execution of a power ; that is, for and against the same person." In this case, however, no authorities were cited either for or

against the proposition of the Master of the Rolls. In the principal case, it will be observed that Sir Joseph Jekyll speaks of a defective execution of a power being aided in the same manner as a surrender would be supplied in the case of a copyhold *devised*; from which it may be inferred that surrenders of copyholds were, in his opinion, supplied only in cases of devises. In *Jefferys v. Jefferys*, Cr. & Ph. 138, a father, by deed, in consideration of the natural love and affection which he had for his three daughters, conveyed certain freeholds, and covenanted to surrender copyholds to trustees upon trust, for the benefit of his three daughters. The father died without having surrendered the copyholds pursuant to the covenant, having, by will, given to his widow part of the freehold and copyhold estate, to the latter of which she was shortly after his death admitted. One of the daughters died; and, upon a bill being filed by the two surviving daughters, who, under the will of their deceased sister, took her interest in the trust estate, praying that the trusts of [*187] the deed might be carried *into execution, and that the widow might be decreed to surrender the copyholds to the trustees, Lord Cottenham held that the title of the plaintiffs to the freeholds was complete, and that they might have a decree so far as the freeholds were concerned; but his Lordship said, "With respect to the copyholds, I have no doubt that the Court will not execute a voluntary contract; and my impression is, that the principle of the Court, to withhold its assistance from a volunteer, applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement." In this case, however, *Rodgers v. Marshall* was not cited, nor do the counsel for the plaintiffs appear to have argued the case upon the ground of the jurisdiction of the Court to supply a surrender, but upon the ground that equity ought to enforce a voluntary contract, as was done by Sir Edward Sugden, C., in *Ellis v. Nimmo*, L. & G. Rep. t. Sugd. 333, in favor of persons having merely a meritorious consideration—a ground certainly not now tenable. (See note to *Ellison v. Ellison*, post.) According, therefore, to the decision of Lord Cottenham in *Jefferys v. Jefferys*, and the inference which may be drawn from the remark of the Master of the Rolls in the principal case, we may conclude that equity will not supply a surrender in the case of a deed at the instance of persons having merely a *meritorious* consideration, any more than it will carry into execution a voluntary contract at the instance of the same persons; secus, where the consideration is valuable: *Nandike v. Wilkes*, Gilb. Eq. Rep. 114; *Jennings v. Moore*, 2 Vern. 609. See *Price v. Price*, 14 Beav. 604.

Although, however, the jurisdiction of equity to supply surrenders of copyholds is now seldom exercised, (see *Freeman v. Freeman*, Kay, 479,) nevertheless, since equity aids defective executions of powers upon precisely the same principles, and for and against the same persons, it will still be useful to consider the cases upon supplying the surrenders of copyholds. See *Sayer v. Sayer*; *Innes v. Sayer*, 7 Hare, 387.

As to the classes in whose favor equity will aid a defective execution of a power or supply a surrender.]—First, equity will aid purchasers, (*Fothergill v. Fothergill*, 2 Freem. 257; *Jackson v. Jackson*, 4 Bro. C. C. 462; *Sergeson v.*

Sealey, 2 Atk. 414; 9 Mod. 390; *Wade v. Paget*, 1 Bro. C. C. 363; *Burrell v. Crutchley*, 15 Ves. 544; *Affleck v. Affleck*, 26 L. J. N. S., Ch. 358;) and mortgagees, (*Taylor v. Wheeler*, 2 Vern. 564; *Jennings v. Moore*, 2 Vern. 609;) and lessees, (*Campbell v. Leach*, Amb. 740; *Shannon v. Bradstreet*, 1 S. & L. 52; *Doe v. Weller*, 7 T. R. 478; Willes, 176; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *King v. Roney*, 5 Ir. Ch. Rep. 64, 72;) *mort- [*188] gagees and lessees being purchasers pro tanto. And it has been laid down, "That in order to constitute a purchaser in whose favor a defective execution of a power can be aided, there must be a consideration and an intention to purchase, either proved or to be presumed," per Sir George Turner, V. C., 9 Hare, 769.

Secondly, equity will aid creditors. Thus, where a person directed his copyhold estate to be sold for payment of debts, and died without having surrendered it to the use of his will, equity decreed the surrender to be supplied, and the copyhold estate to be sold. See *Bixby v. Eley*, 2 Bro. C. C. 325; S. C., 2 Dick. 698; *Ithell v. Beane*, 1 Ves. 215; *Tudor v. Anson*, 2 Ves. 582; *Fothergill v. Fothergill*, 2 Freem. 257. In *Wilkes v. Homes*, 9 Mod. 485, power was given, in a marriage settlement, to the husband and wife to raise 2000*l.* out of certain lands of the wife's; and if no part should be raised in the life of the husband and wife, then it should be lawful for the survivor of them, by will *duly* executed, to raise that sum, for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for younger children. The wife, upon the death of the husband, defectively executed the power; it was objected, that the debts which were to be paid by means of the power were the debts of the husband, whereas the estate was originally the wife's. However, Lord Hardwicke supplied the defect, observing that the debts were expressly provided for by the deed of settlement.

Thirdly, charities will be aided. "I take," says Lord Northington, "the uniform rule of this Court, both before, at, and after the Statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the Court will aid a defective conveyance to such uses:" *Attorney-General v. Tancred*, 1 Eden, 14: see also *Piggot v. Penrice*, Prec. Ch. 471; Com. Rep. 250; *Attorney-General v. Sibthorp*, 2 Russ. & My. 111 n. In *Innes v. Sayer*, (7 Hare, 377,) a testatrix had power to dispose of certain sums of stock by her last will and testament, or any writing purporting to be her last will and testament, to be by her signed and published in the presence of, and attested by, two or more credible witnesses. The testatrix by her will, dated in January, 1833, unattested, and not referring to the power, gave certain sums of stock to charities. She afterwards made eight other unattested testamentary papers, giving legacies, or revoking legacies, previously inserted, the last of which papers was dated the 1st of September, 1836; and at the foot of it she had written as follows:—"This will has not been witnessed, as I intend, if I am spared, to write it out fair." The testatrix died in June, 1844. It *was held by Sir James Wigram, [*189] V. C., that the defect in the execution of the power ought to be sup-

plied in equity in favor of the charities. "The principle," said his Honor, "upon which the Court appears to go is this, that if a person has power, by his own act, to give property, and has, by some paper or instrument, clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shown his intention to do it, the Court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion whether the principle is right or not. There appears to be very high authority for the application of the principle, independently of the Statute of Elizabeth; and it has been applied since the Statute." See S. C., affirmed on appeal, 3 Mac. & G. 606.

Fourthly, equity will aid a wife and a legitimate child, although they claim merely as volunteers, upon a meritorious consideration: as, for instance, upon a provision made for them after marriage: *Fothergill v. Fothergill*, 2 Freem. 257; *Sarh v. Blanfrey*, Gilb. Eq. Rep. 166; *Sneed v. Sneed*, Amb. 64; *Churchman v. Hervey*, Amb. 335; *Medwin v. Sandham*, 3 Swanst. 686; *Affleck v. Affleck*, 26 L. J. N. S., Ch. 358. "In cases," says Lord Hardwicke, "of aiding the defective execution of a power, either for a wife or a child, whether the provision has been for a valuable consideration has never entered into the view of the court; but being intended for a provision, whether voluntary or not, has been always held to entitle this Court to give aid to a wife or child to carry it into execution, though defectively made: *Hervey v. Hervey*, 1 Atk. 567.

Although an inference to the contrary might be drawn from the principal case, it is now clearly established that a wife or child, although provided for, will be entitled to the aid of equity. "I am of opinion," says Lord Hardwicke, in *Hervey v. Hervey*, "that the rule as laid down by the defendant's counsel, that a wife or child, who come for the aid of this Court to supply a defective execution of a power, must be entirely unprovided for, is not the right rule of the Court. I think the general rule, that the husband or a father are the proper judges what is a reasonable provision for a wife or child, is a good and invariable rule:" 1 Atk. 568; see also *Kettle v. Townsend*, 1 Salk. 187; *Smith v. Baker*, 1 Atk. 385; *Chapman v. Gibson*, 3 Bro. C. C. 229.

To no other persons, except a wife or legitimate child, will the aid of the Court be granted, upon the ground of the provision being for a meritorious [*190] consideration; neither to a husband, *(*Watt v. Watt*, 3 Ves. 244; *Moodie v. Reid*, 1 Madd. 516; *Hughes v. Wells*, 9 Hare, 749, 769;) nor to a natural child,) *Fursaker v. Robinson*, Prec. Ch. 475; *Tudar v. Anson*, 2 Ves. 582;) nor to a grandchild, (*Bland v. Bland*, 2 Cox, 349; *Perry v. Whitehead*, 6 Ves. 544; and 1 Watk. Copyh. 136, 138;) nor to a father, (*Sloane v. Lord Cadogan*, App. to Sug. on Powers, No. 9, 7th edit.) nor to a mother, brother, or sister, (*Goodwyn v. Goodwyn*, 1 Ves. 228; *Goring v. Nash*, 3 Atk. 189, overruling *Watts v. Bullas*, 1 P. Wms. 60;) nor to a nephew or niece, (*Strode v. Russell*, 2 Vern. 621, 625; *Marston v.*

Gowan, 3 Bro. C. C. 170;) nor to a cousin, (*Tudor v. Anson*, 2 Ves. 582;) nor to a settlor defectively executing a power in his own favor, (*Ward v. Booth*, cited 3 Ch. Ca. 69, 92; *Ellison v. Ellison*, post, 6 Ves. 656. A fortiori, equity will not afford its aid to a mere volunteer, in no way related to the person defectively executing a power: *Smith v. Ashton*, 2 Freem. 309; *Sergeson v. Sealey*, 2 Atk. 415; *Godwin v. Kilsha*, Amb. 684. It is clearly settled, that a defective appointment by a married woman will be aided, (*Pol-lard v. Greenvil*, 1 Ch. Ca. 10; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Doe v. Weller*, 7 T. R. 480; *Stead v. Nelson*, 2 Beav. 245; although, by some extra-judicial observations of Sir Thomas Plumer, in *Martin v. Mitchell*, 2 J. & W. 424, this appears to have been doubted. See also *Dillon v. Grace*, 2 S. & L. 456.

Next, as against whom equity will aid a defective execution of a power, or supply a surrender.—It is clear, from the principal case, that aid will be granted as against the remainderman who takes, although by purchase, subject to the power, (*Coventry v. Coventry*, 2 P. Wms. 222; *Shannon v. Bradstreet*, 1 S. & L. 52;) and also in general as against an heir-at-law or customary heir: *Smith v. Ashton*, 1 Ch. Ca. 263, 264.

It has, however, been a question of much difficulty, whether equity will afford its aid as against an heir totally unprovided for. In *Chapman v. Gibson*, 3 Bro. C. C. 228, Lord Alvanley thought that the heir, being a son of the testator unprovided for, could not be relieved against. "The principle," said his Lordship, "must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and, if the testator has totally forgot to make any provisions for his eldest son, this shall be an answer to the claim of the wife, or other children." Lord Rosslyn thought that the Court ought never to enter into the consideration of the heir being or not being provided for. "I confess," observes his Lordship, "it appears to me, [*191] *there is no rule at all, unless the Court takes it upon the relation in which they stand. Otherwise, it is all loose and arbitrary. It never entered into the mind of the Court to consider that argument, where the want of a surrender was to be supplied for creditors: but the same sort of argument might be used there—that the heir was starving, the creditors opulent and severe. Those circumstances are not fit to be considered by the Court. The Court must go upon a certain line, which is very obvious—that, where the will expresses an intention to do that which legally and morally the testator ought to do, so simple a form as supplying the want of a surrender shall not impede the performance of that duty:" *Hills v. Downton*, 5 Ves. 564. But, it was unnecessary to decide that point in *Hills v. Downton*, for the heiresses-at-law, against whom the want of a surrender was supplied, were married, and therefore, in Lord Rosslyn's opinion, provided for. Lord Alvanley, nevertheless, still retained the opinion he expressed in *Chapman v. Gibson*. See his observations on *Hills v. Downton*, Sudg. Pow. vol. ii., App. No. xxiv., 7th ed. In *Braddick v. Mattock*, 6 Madd. 363, Sir J. Leach, V. C., said, "This Court will not supply a surrender against the heir-at-law unprovided

for; but it considers the parent as the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory." In *Rodgers v. Marshall*, 17 Ves. 294, Sir W. Grant, M. R., seemed inclined to think, that, as against a grandchild, being the heir-at-law, and unprovided for, the want of a surrender ought not to be supplied, and directed an inquiry as to whether he was provided for. But see *Hills v. Downton*, 5 Ves. 565.

It is clear, however, that a surrender will be supplied as against a collateral heir, whether provided for or not; as a person is not supposed under any obligation to provide for a collateral heir: *Fielding v. Winwood*, 16 Ves. 90; see also *Chapman v. Gibson*, 3 Bro. C. C. 229; *Smith v. Baker*, 1 Atk. 385.

As to the nature of a defect which will be aided.—It may be laid down as a general rule, that where the intention to execute a power is sufficiently declared, but the act declaring the intention is not an execution of the power in the form prescribed, there the neglect will be supplied in equity: *Shannon v. Bradstreet*, 1 S. & L. 63.

Thus equity will aid a defect which arises from the instrument itself being informal or inappropriate, if the intention to execute the power appear clearly in writing, where, for instance, a donee of a power covenants to execute it:

[*192] (*Fothergill v. Fothergill*, 2 Freem. 256; *Coventry v. Coventry*, *Franc. Max., the last case; S. C., 2 P. Wms. 222; *Sergeson v. Sealey*, 2 Atk. 414; *Sarth v. Lord Blandfrey*, Gilb. Eq. Rep. 166;)—or when, by his will, he desires the remaindermen to create the estate authorized by the power, (*Vernon v. Vernon*, Amb. 1;)—or if he enters into an agreement to execute it, (*Shannon v. Bradstreet*, 1 S. & L. 52; *Mortlock v. Buller*, 10 Ves. 292; *Coventry v. Coventry*, Franc. Max., the last case; *Lowry v. Dufferin*, 1 Ir. Eq. Rep. 281; *Dowell v. Dew*, 1 Y. & C. C. C. 345;)—even although he keep the agreement in his own possession, (*King v. Roney*, 5 Ir. Ch. Rep. 64, 77;)—or if he promises by letters to grant an estate, which he could only do by the exercise of his power: *Campbell v. Leach*, Amb. 740; Sudg. on Powers, App. No. xxv., 7th ed.; and see *Blake v. French*, 5 Ir. Ch. Rep. 246. A recital by the donee of a power, in the marriage settlement of one of his daughters, who was one of the objects of the power, that she was entitled to a share of a sum to which she could only be entitled by his appointment, has been held sufficient evidence of his intention to execute the power, and was therefore aided as a defective execution of a power: *Wilson v. Pigott*, 2 Ves. jun. 351; *Poulson v. Wellington*, 2 P. Wms. 533. So also where a donee of a power, in an answer to a bill in Chancery, states that he "appoints, and intends, by writing in due form, to appoint:" *Carter v. Carter*, Mos. 365; and see *Forrescue v. Gregor*, 5 Ves. 553.

A parol contract, however, to execute a power, is void, as against a remainderman, although, in the case of a parol contract to grant a lease under a power, the lessee may have expended money in improvements, on the faith of the parol contract, (*Carter v. Carter*, Mos. 370; *Shannon v. Bradstreet*, 1 S. & L. 72; *Blore v. Sutton*, 3 Mer. 237; *Lowry v. Lord Dufferin*, 1 Ir. Eq. Rep. 281; and see *Morgan v. Milman*, 10 Hare, 279; 3 De G. Mac. &

G. 24, 32, 33;) unless, after the death of the tenant for life, the remainderman lie by and suffer the lessee to continue to improve the estate: *Stiles v. Cowper*, 3 Atk. 692.

Equity will afford its aid, where there has been a defective execution by a formal or appropriate instrument: thus, if the instrument, whether it be a deed or will, is by the power required to be executed in the presence of a certain number of witnesses, and it is executed in the presence of a smaller number; or if it is required to be signed and sealed, and sealing is omitted, equity will supply the defect: *Wade v. Paget*, 1 Bro. C. C. 363; *Cockerell v. Cholmeley*, 1 Russ. & My. 424; 1 C. & F. 60. And in wills not coming within the operation of the late Wills Act, an appointment of personalty, required to be attested by two witnesses, has been aided, though attested *by no witness: *Lucena v. Lucena*, 5 Beav. 249. So, also, where a [*193] power of appointment over land was required to be exercised by will *duly executed*, and a will was made in exercise of the power, attested by two witnesses only, Lord Hardwicke was of opinion that the will was not duly executed within the meaning of the power, but that the Court ought to aid the defective execution in favor of the creditors and younger children, considering their claim as under the settlement, and the mode of executing the power as depending on the settlement, and not on the Statute of Frauds, except as the words "duly executed" were construed by reference to that statute. If this had been a voluntary execution of the power, and not for payment of debts, or for valuable or meritorious consideration, it must have stood on its own ground, and would not have been supported: *Wilkie v. Holmes*, 1 S. & L. 60, n.; S. C., reported under the name of *Wilkie v. Holme*, 1 Dick. 165; S. C., 9 Mod. 485; and see *Smith v. Ashton*, 1 Ch. Ca. 263. See, however, now, 1 Vict. c. 26, ss. 9, 10, whereby it is enacted, "that no will shall be valid unless it shall be in writing and executed in manner thereafter mentioned: that is to say, it shall be signed at the foot or end thereof, by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will, in the presence of the testator, but no form of attestation shall be necessary;" and "that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner thereinbefore required; and every will executed in manner thereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

A power will, as in the principal case, be aided, if it has been executed by a will, when it ought strictly to have been executed by deed: *Sneed v. Sneed*, Amb. 64; *Mills v. Mills*, 8 Ir. Eq. Rep. 192.

But equity will not aid a defective execution of a power, if the intention of the author of the power would be thereby defeated. Thus, although there is no doubt that a court of equity will aid the defective execution of a power

in favor of a creditor or purchaser, although the donee be a married woman, *ante*, p. 190,) the Court, in such cases, must be satisfied that the formalities [*194] which have not been observed, are no *more than matters of form; and that the donee of the power has not by their non-observance been deprived of any of the protection which the due exercise of the power would have afforded her. For instance, in *Reid v. Shergold*, 10 Ves. 370, where a lady, entitled under a devise to copyholds for life, with a power to appoint them *by will*, sold and surrendered them to a purchaser, Lord Eldon held, that the purchaser could not be aided in equity. "The testator," said his Lordship, "did not mean that she should so execute her power—he intended that she should give by will, or not at all; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt in or towards the execution of the power."

And the Court looks with especial jealousy on any such transaction, in which the wife may have acted under the influence of her husband. Thus in *Hopkins v. Myall*, (2 Russ. & My. 86,) on a marriage, a settlement had been made of the wife's property to herself for life to her separate use, with remainder as she should appoint by any writing under her hand, attested by two witnesses, and for default of appointment to the children of the marriage. The trustees upon the joint application of the husband and wife, by a letter not attested by any witnesses, parted with the trust fund; it was held by Sir John Leach, M. R., that the trustees were bound, after the death of the wife, to make good the trust fund for the children. "The ceremonies," said his Honor, "required by the settlement were introduced for the express purpose of protecting the wife against the influence of her husband, and are matters of substance and not of form; and without any adherence to those ceremonies, the interests of the children could not be defeated." See, also, *Thackwell v. Gardiner*, 5 De G. & Sm. 58; and *Majoribanks v. Hovenden*, 6 Ir. Eq. Rep. 238. In *Cockerell v. Cholmeley*, 1 Russ. & My. 418, where an estate was devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, and a power of sale, with the consent of the tenant for life, was given to the trustee, the trustee, with the consent of the tenant for life, sold the estate under the power, without the timber, which was to be taken at a valuation: at law the power was held to be badly executed; and, upon a bill being filed in equity for relief by the purchasers of the estate, Sir J. Leach, M. R., held, that they were entitled to none. "The plaintiffs," said his Honor, "call upon this Court to supply the defect in the execution of the [*195] power. A court of equity will, in favor of *persons standing in the situation of the plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution, as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a will instead of a deed. But here it is at law decided, that there was no power in the trustees to sell the land without the growing timber; and there is no execution by the trustees of the power to

sell the land with the growing timber ; and I find no authority which applies to the case." This case was, on appeal to the House of Lords, affirmed : 2 Russ. & My. 751. See also *Adney v. Field*, Amb. 654 ; *Stratford v. Lord Aldborough*, 1 Ridg. 281 ; *Scott v. Davis*, 4 My. & Cr. 87.

Lastly, as to what powers will be aided.—There is no doubt that powers of jointuring, of raising portions, of sale, of revoking uses, and generally appointing an estate, will, if defectively executed, be aided. It was, however, at one time doubted whether defective appointments under powers of leasing would be aided as against the remainderman. See Powell on Powers, 389. Lord Redesdale, however, in *Shannon v. Bradstreet*, 1 S. & L. 52, held a contract to grant a lease by a tenant for life, according to a power, binding upon a remainderman, although it was objected that a leasing power differs from other powers, inasmuch as in other powers the remainderman has no interest in the mode in which the power is executed, as he claims nothing under it, but that under the leasing power he claims the rent reserved. "On what ground," said his Lordship, "can it be contended that that which is a mere charge upon a remainderman is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that the power is given for the benefit both of the tenant for life and of all persons claiming after him ; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants ; and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. . . . This, therefore, is a power which is calculated for the benefit of the estate. Other powers, generally speaking, such as jointuring powers, and powers to make provisions for younger children, are calculated for the benefit of the family ; they may be indirectly beneficial to the remainderman, in some respects, but they are no direct benefit to him ; nor can I conceive why these *powers should be construed more liberally than powers to make leases, except where it is evident that such power is abused ; and in case of letting leases, the power is certainly more liable to be abused than in making provisions for wife or children. In these latter cases, the sum to be raised is generally limited, and cannot be exceeded ; but a power of leasing is, to a certain extent, a power of charging ; if a fine is taken, it is unquestionably so ; and even where no fine can be taken, it is, to a certain degree, a charge, and for the benefit of tenant for life as well as the remainderman, for tenant for life will get a better rent than if he had no such power. I cannot conceive, therefore, what distinction there is between a leasing power and the other powers before noticed ; they are all powers given to tenant for life for his benefit, to enable him to charge the estate ; and in case of a rack-rent, the power of leasing is also a benefit to the remainderman. Now, in case of a jointuring power, and in all the other cases, a contract has been held sufficient to enable a party to have the power executed in equity." See, also, *Doe v. Weller*, 7 Term Rep. 478 ; Willes,

176; and *Dowell v. Dew*, 1 Y. & C. C. C. 345, where an agreement to grant a lease was held binding as against a feme covert, as being a defective execution of her power of leasing.

The legislature has also extended the remedies of lessees by the act for granting relief against defects in leases made under powers of leasing in certain cases, see 12 & 13 Vict. c. 26, suspended in its operation by a subsequent act in the same session until the 1st of June, 1850, (12 & 13 Vict. c. 110,) and amended by 13 & 14 Vict. c. 17.

But equity will not aid a defect even in favor of purchasers, if the execution of the power would involve a breach of trust, (*Mortlock v. Buller*, 10 Ves. 292; *Stratford v. Lord Aldborough*, 1 Ridg. 281;)—or would be a fraud upon the power: *Harnett v. Yielding*, 2 S. & L. 549. And a power of leasing will not be aided where the best rent has not been reserved, or a fine has been paid, contrary to the requisitions of the power; or where there has been an agreement or covenant to grant a lease, commencing in futuro, where the power authorizes only leases in possession, and the donee has died before the estate fell into possession, (*Campbell v. Leach*, Amb. 740; *Shannon v. Bradstreet*, 1 S. & L. 52; *Doe v. Weller*, 7 Term Rep. 478; Willes, 176; *Dowell v. Dew*, 1 Y. & C. C. C. 345, 356; *Temple v. Baltinglass*, Rep. t. Finch, 275.) But it seems that when the question is raised, whether the rent reserved is adequate or not, courts of equity will not decline to aid the imperfect execution of the power of leasing, unless the rent be so low, as to afford evidence of fraud: *King v. Roney*, 5 Ir. Ch. Rep. 64, 77.

[*197] *In *Sandham v. Medwin*, 3 Swanst. 685, where unusual and unheard-of covenants were introduced into the lease, "usual and reasonable covenants" being required by the power, a court of equity would not interfere. If a tenant for life has power to lease, with the consent of trustees or others, an agreement by the tenant for life alone to lease will not be aided: *Lawrenson v. Butler*, 1 S. & L. 13. In *Shannon v. Bradstreet*, 1 S. & L. 52, where a tenant for life, with power to grant leases "in possession, and not in reversion," entered into an agreement to grant a lease a day or two before the lease was to commence, the tenant for life having survived that time, no objection arose, and the agreement was held by Lord Redesdale to be binding upon the remainderman. See, also, *Dowell v. Dew*, 2 Y. & C. C. C. 345.

A court of equity will not grant its aid where there is a defect in the execution of a power under an act of Parliament, which must always be taken strictly: thus, if a tenant in tail make a lease for years, not authorized by 32 Hen. 8, equity will not make good the defect: *Roswell's case*, per Hutton, Ro. Abr. 379, fol. 6. See, also, Cowp. 267; 2 Burr. 1146; *Anon.*, 2 Freem. 224.

We must, however, distinguish between the defective execution and the non-execution of a power, for a non-execution of a power will not be aided: [even when the power is given to a tenant for life to dispose of the reversion by deed or will, at his death, and would, if executed, render the whole equitable assets for the payment of his debts: *Johnson v. Cushing*, 15 New Hampshire, 298:] a person, for instance, is not entitled to the aid of the Court on the ground of the execution of the power having been prevented by the sudden death of the

donee: *Pigott v. Penrice*, Com. 250; *Gilb. Eq. Rep.* 138. So, disability to sign from gout has not been aided: *Blockvill v. Ascott*, 2 Eq. Ca. Abr. 659, n.; and see *Buckell v. Blenkhorn*, 5 Hare, 131. We may, however, except those cases in which the execution of a power has been prevented by fraud, as where the deed creating the power has been fraudulently retained by the person interested in its non-execution, for then it seems equity will afford its aid: 3 Ch. Ca. 83, 84, 122; *Ward v. Booth*, cited 3 Ch. Ca. 69. See, also, *Pigott v. Penrice*, Prec. Ch. 471; *Vane v. Fletcher*, 1 P. Wms. 354; *Luttrell v. Olmius*, cited 11 Ves. 683; *Seagrave v. Kirwan*, 1 Beat. 157; *Bulkley v. Wilford*, 2 C. & F. 102; *Middleton v. Middleton*, 1 J. & W. 94.

It may here be mentioned that if a will is in other respects properly executed, probate cannot be refused upon the ground that the power under which it has been made has not been properly followed. See *Barnes v. Vincent*, (5 Moore, P. C. C. 201,) where a decision of the Prerogative Court refusing probate to the will of a feme covert, on the face of it not executed according to the requisites of the power, was reversed by the Judicial Committee of the Privy Council. "It is certain," *said Lord Brougham, "that there [*198] is a considerable class of cases, in which equity will relieve against a defective execution of a power. Thus in favor of a purchaser; of a creditor; of a child; equity will relieve. But if probate shall have been refused by the Ecclesiastical Court, on the ground of the execution being defective, no such relief ever can be extended in any case; because the Court, which alone can relieve, never can know if the instrument had existed, nor can see the defect in the execution; and the Court of Probate is bound by the fact of the defective execution, and cannot remedy it. Thus a feme covert having made a will in favor of a child, and imperfectly executed it, the child must be excluded, by probate being refused; when, had a court of equity been put in possession of the instrument, it would have held the defective execution relievable in the child's behalf." See and consider *Este v. Este*, 15 Jur. 159.

The will in *Barnes v. Vincent* was made prior to the passing of the Wills Act, (1 Vict. c. 26,) and it must be remembered, that by that Act, no appointment made by will, in exercise of any power, will be valid, unless the same be executed with the solemnities required by the Act; but if those are complied with, the appointment will be valid, although some additional or other form of execution or solemnity may have been required by the power. See sects. 9 and 10, *ante*, p. 193.

Where forms are imposed on the execution of a power, the circumstances must be strictly adhered to; and however arbitrary, and unessential to the validity of the appointing instrument, they must be strictly pursued, in order to constitute a good

execution in law; *Pepper's Will*, 1 Parson's Eq. 436, 446; *Porter v. Turner*, 3 S. & R. 108; *Slifer and others v. Beates and another*, 9 Id. 166, 181; *Ford et al. v. Russell et al.*, 1 Freeman, 42, 50; *Marshall v. Stephens et als.*, 8 Humphreys, 159, 173.

But "whenever the intention to execute a power is sufficiently manifest, but the execution is defective, or it has not been executed according to the terms, or in the form prescribed, equity will correct the mistake or supply the defect. When nothing has been done, or attempted to be done, toward the execution of a power, equity, in general, will not interfere, unless the instrument creating the power shall have vested, or recognized in third persons, rights, to secure which the execution of the power is necessary. If the attorney or agent has attempted to execute the power, but has done it defectively, the party claiming under it, cannot avail himself of it, at law, but equity interposes its aid, upon the broad principle of relieving against accident or mistake;" *Barr v. Hatch and others*, 3 Ohio, 527, 529. Equity will aid the defective execution of a power in favor of purchasers, for a valuable consideration; *Schenck v. Ellingwood*, 3 Edwards, 175, 176; *Thorp et al. v. McCullum et al.*, 1 Gilman, 615, 629; in favor of a charity; *Pepper's Will*, 1 Parson's Eq. 436, 446; and in favor of creditors, and of a wife or a legitimate child; *Porter and others v. Turner and others*, 3 Sergeant & Rawle, 108, 111, 114; *Dennison v. Goehring*, 7 Barr, 175, 180; see also, *Bradish v. Gibbs*, 3 Johnson's Chancery, 523, 550; but not in favor of grand-children, where in default of appointment, the estate would go to grand-children; *Porter and others v. Turner and others*.

But relief will not be given in equity, where the act which may have been done about the property cannot reasonably be referred to an intention to execute the power; *Ford et al. v.*

Russell et al., 1 Freeman, 42, 51. Nor can that court give aid in the case of a defective power; it cannot, therefore, give validity to a conveyance where an attorney, conveying by a sealed instrument, has not been appointed under seal; *The Heirs of Piatt and others v. The Heirs of McCullough*, 1 McLean, 69, 82. In *Robert's Widow and Heirs v. Stanton*, 2 Munford, 129, 138, 139, where one trustee, only, had conveyed under a power which was required to be executed by all jointly, Tucker, J., was of opinion, that as there was a want of competency in the person acting, to execute the power, except in conjunction with others, it was not a case in which chancery would relieve on the ground of aiding a defective execution of a power; but Fleming, J., considered, that it was a case in which a power had been imperfectly executed, and that in favor of a valuable consideration, equity would supply the defect; and the latter view appears to be correct. See *Thorp et al. v. McCullum et al.*, 1 Gilman, 615, 629.

Though equity will never supply a non-execution of a bare power; *Johnson v. Cushing*, 15 New Hampshire, 178; yet if a trust has been imposed in connection with the power, upon a person who was to execute it, equity will not allow the person intended to be benefited, to suffer from the negligence, mistake or ignorance of the trustee, or other circumstances; *Withers v. Yeadon*, 1 Richardson's Equity, 325, 229; *Gibbs v. Marsh*, 2 Metcalf, 243, 251; *Thorp et al. v. McCullum et al.*, 1 Gilman, 615, 625, 630. Thus in *Norcum v. D' Deuch*, 17 Missouri, 98, a power given to a widow, who took a life estate under the will, to sell for the benefit of chil-

dren, with the consent of the executor, was held to be a trust for the children, coupled with an interest in herself; and the court, consequently, upheld the title of a purchaser under the power, notwithstanding the refusal of the executor to concur in the sale.

The remedy, in cases of aiding an

imperfect execution, is, in chancery, only, where it proceeds upon the ground of compelling parties, in respect of the consideration, to supply a defect in their acts: the transaction remains defective and inoperative in law; *Sinclair v. Jackson*, 8 Cowen, 544, 588.

VOLUNTARY TRUSTS.

*ELLISON v. ELLISON.

[*199]

FEB. 24, 1802.

REPORTED 6 VES. 656.

VOLUNTARY TRUSTS.]—*Distinction as to volunteers. The assistance of the Court cannot be had without consideration, to constitute a party cestui que trust, as upon a voluntary covenant to transfer stock, &c.; but if the legal conveyance is actually made, constituting the relation of trustee and cestui que trust, as if the stock is actually transferred, &c., though without consideration, the equitable interest will be enforced.*

Settlement of leasehold estates not revoked by a subsequent assignment by the trustee to the settlor entitled for life, or by the will of the latter; no intention to revoke appearing; and the terms of a power of revocation not being complied with.

By indentures dated the 1st of July, 1791, reciting a lease, dated the 6th of June preceding, of collieries at Hebburn and Jarrowwood, in the county of Durham, for thirty-one years, to Charles Wren and others; and that the name of Wren was used in trust for Nathaniel Ellison and Wren, in equal shares; it was declared, that Wren, his executors and administrators, would stand possessed of the lease, in trust, as to one moiety, for Ellison, his executors, &c.

By another indenture, dated the 18th of June, 1796, reciting, that Ellison was interested in and entitled to one undivided eighth part of certain collieries at Hebburn and Jarrow, held by two several leases for terms of thirty-one years, and that he was desirous of settling his interest, he assigned and transferred all his interest in the said collieries, and all the stock, &c., to Wren, his executors, *administrators, and assigns, in trust for Nathaniel Ellison, and his assigns during his life; and, after his decease, in trust to manage and carry on the same, in like manner as Wren should carry on his own share; and upon further trust, out of the profits, to pay to Margaret Cla- [*200]

vering, during the remainder of the term, in case she should so long live, the yearly sum of 103*l.* 2*s.* 8*d.*, which sum is thereby mentioned to be secured to her by an indenture, dated the 14th of May last; and, subject thereto, in trust to pay thereout to Jane Ellison, in case she should survive Nathaniel Ellison, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, the clear yearly sum of £180; and after the decease of Anne Furye, then the yearly sum of £90, during the remainder of the term, in case Jane Ellison should so long live; and, subject as aforesaid, upon trust to pay thereout, to each of the children of Nathaniel Ellison that should be living at his decease, during the remainder of the term, during the joint lives of Jane Ellison and Anne Furye, and the life of the survivor, the yearly sum of £30 apiece; and after the decease of the survivor, the yearly sum of £15; and upon further trust to pay the residue of the profits arising from the collieries to the eldest son of Nathaniel Ellison, who should attain the age of twenty-one; and upon the death of Margaret Clavering, then upon trust to pay to each of the children of Nathaniel Ellison the further yearly sum of £10; with survivorship, in case any of the children should die before twenty-one, or marriage of daughters, provided none except the eldest should be entitled to a greater annuity than £50; and upon further trust to pay the residue to the eldest son; provided further, in case all the children die before twenty-one, or the marriage of daughters, upon trust to pay the whole to such only child at twenty-one, or marriage of a daughter; provided further, in case the profits to arise from the collieries should not be sufficient to pay all the annuities, the annuitants, except Margaret Clavering, should abate, to be made up whenever the profits should

[*201] be sufficient; and upon further trust, in case Wren, his executors or *administrators, should think it more beneficial for the family to sell and dispose of the collieries, upon trust to sell and dispose of the same for the most money that could reasonably be got, and to apply the money, in the first place, in payment of all debts due from the collieries, in respect of the share of Ellison; and, subject thereto, to place out the residue on real securites, and apply the interest, in the first place, in payment of the annuity of 103*l.* 2*s.* 8*d.* to Margaret Clavering; then to the annuities of £180, or £90; then to pay all the children of Ellison, during the life of Margaret Clavering, the yearly sum of 22*l.* 10*s.*, and to pay the residue of the dividends and interest to the eldest son of Ellison, in manner aforesaid; and if the dividends, &c., should not be sufficient for the annuities, the two annuitants, except Margaret Clavering, to abate; and, after her death, to pay to each of the children of Nathaniel Ellison the further yearly sum of 2*l.* 10*s.* for their lives; and, after the decease of Margaret Clavering and Jane Ellison, upon trust to pay to each of the children of Nathaniel Ellison the sum of £500, in case the money arising from the sale should be sufficient; then upon trust to divide the same equally among all the children, share and share alike; and, subject as aforesaid, to pay over the residue to the eldest son on his attaining twenty-one; and it was declared, that the portions of the children should be paid to the sons at twenty-one, to the daughters at twenty-one or marriage; and in case of the death of any before such period, to pay that share to the

eldest son at twenty-one; and if only one child should survive, to pay the whole to such one at twenty-one or marriage, if a daughter; and in case all die before twenty-one, &c., then the said Charles Wren, his executors and administrators, shall stand possessed of the said collieries, and the money to arise by sale thereof, subject as aforesaid, in trust for Nathaniel Ellison, his executors, administrators, and assigns. It was further declared, that the annuities should be paid half-yearly; and that, upon any such sale, the receipt of Wren, his executors or administrators, should be a sufficient discharge to purchasers. Then followed *this proviso:—"Provided always and it is hereby fur- [*202] further declared, that it shall and may be lawful for the said Nathaniel Ellison, by any deed or deeds, writing or writings, to be by him signed, sealed, and delivered in the presence of and *attested by two or more credible witnesses*, to revoke, determine, and make void all and every the uses, trusts, limitations, and powers hereinbefore limited and created, of and concerning the said collieries and coal-mines; and by the same deed or deeds, or by any other deed to be by him executed in like manner, to limit any new or other uses of the said collieries and coal-mines, as he, the said Nathaniel Ellison, shall think fit."

By another indenture, dated the 3rd of July, 1797, *but not attested by two witnesses*, reciting the leases of the collieries, and that the name of Charles Wren was used in trust for Nathaniel Ellison and himself, in equal shares, and that Ellison had advanced an equal share of the moneys supplied for carrying on the collieries, amounting to 9037*l.* 10*s.*, it was witnessed, that, in consideration of 4518*l.* 15*s.*, Wren assigned to Nathaniel Ellison one undivided moiety or half part of all the said collieries, demised to him by the said several leases, with a like share of the stock; to have and to hold the said collieries to Ellison, his executors, administrators, and assigns, for the residue of the said terms, subject to the rents, covenants, and agreements in the said leases; and to have and to hold the stock unto Ellison, his executors, administrators, and assigns, to and for his and their own proper use for ever, with the usual covenants from Wren as to his title to assign, &c., and from Ellison to indemnify Wren, his executors, &c.

Nathaniel Ellison, by his will, dated the 22nd June, 1796, after several specific and pecuniary legacies, gave all the rest and residue of his personal estate and effects, of what nature or kind soever, not before disposed of, to his wife, and Wren, and the survivor, and the executors and administrators of such survivor, upon trust to call and place the same out in the funds, or on real securities; and he directed that all sums of money which should come to the hands of his wife, and Wren, or of the executors, *&c., of [*203] either of them, under the said trusts, should be equally divided between all his children, sons and daughters, born and to be born, share and share alike; the shares to become vested and be payable upon marriage, with consent of their guardians, and not otherwise, until the age of twenty-one; such part of the interest in the mean time, as the guardians shall think proper, to be applied for maintenance; the residue to accumulate; with a direction for payment of part of the principal for advancement, and survivorship upon the death of any before the respective shares should be payable; and, in

case of the death of all under age and unmarried, he gave the dividends and interest to his wife for life; and, upon her death, he gave the principal and a sum of £3000, charged upon her estates, to his sister, Margaret Clavering, and his nephew. Then, after some further dispositions of stock in favor of his children, he gave a legacy of twenty guineas to Wren, and appointed his wife and Wren executors and guardians.

The testator died in 1798, leaving his widow and ten children surviving; one of whom, Charles Ellison, died in 1799, an infant. Wren also died in that year.

The bill was filed by the testator's widow and Margaret Clavering, praying, that the trusts of the deed of June, 1796, may be established, and that new trustees may be appointed.

The younger children, by their answer, submitted whether the trusts of that deed were not varied or revoked by the deed of July, 1797.

Mr. *Romilly* and Mr. *Bell*, for the plaintiffs, insisted, that the subsequent deed, not reciting or taking any notice of the prior settlement, could not revoke it; that it was not the object of the latter deed to revoke the former; and that it was not attested by two witnesses, as, in order to effect a revocation, it ought to be.

Mr. *Richards*, for the eldest son, defendant, claiming also under the deed of 1796, declined to argue the case.

[*204] Mr. *Steele* and Mr. *W. Agar*, for the other defendants, *the younger children.—Though the expression in the clause of revocation is “deed or writing,” a will with two witnesses would do, according to the case¹ from Ireland, cited in *Lord Darlington v. Pulteney*.² No intention, however, can be founded in the will to revoke this settlement; but the subsequent deed is an implied revocation. What use could there be in that deed but to give Ellison the absolute estate, which is quite inconsistent with the trusts of the former deed, which are very special, and give a large discretion? An instrument may be revoked by another, though not taking notice of the former, but only making a disposition inconsistent with it: *Lord Fauconberge v. Fitzgerald*;³ *Arnold v. Arnold*.⁴ And though the latter of these cases was upon a will, there is no difference upon a voluntary settlement. There is no instance in which a voluntary deed, defective, and not effectual at law, has been aided in this court; and though this is, in some respects, in favor of a wife and children, one of the parties claiming under it is a volunteer; and it is opposed by nine out of ten children. This deed, like that in *Colman v. Sarrel*,⁵ cannot be proceeded upon at law. But if the trust was originally well created, yet if the subject gets back, and is vested in the author of the trust, the objection lies.

Mr. *Romilly*, in reply.—Can it be stated as a question here, whether a settlement for a wife and children can be enforced against the representative

¹ *Roscommon v. Fowke*, 6 Bro. P. C., Toml. ed., 158.

² Cowp. 268.

³ 6 Bro. P. C. 295, Toml. ed.

⁴ 1 Bro. C. C. 401.

⁵ 1 Ves. jun. 50; S. C., 3 Bro. C. C. 12.

of the father or the husband? *Colman v. Sarrel* has not the most remote application; the parties claiming under the deed being mere strangers, except by a connection illegal and immoral. It is not necessary to consider the case of a mere volunteer. Mrs. Clavering was a creditor by an annuity secured by a prior deed. Supposing Ellison had an intention to revoke this settlement, he had prescribed to himself certain forms, the attestation of two witnesses. There is no instance of an implied revocation of trusts, which are only to be revoked expressly, by a particular, certain form. But there is not the least pretence upon these instruments, either the deed or the will, of any such intention. The *will was executed only four days after the settlement, [*205] which is not noticed in either instrument. It is no more than consenting that the trustee, having the legal interest, shall assign to another person, and taking it himself. Notwithstanding the length the Court have gone upon wills,¹ this would not be a revocation even of a will, merely taking the legal interest, having disposed of the equitable. The intention that these trusts should not prevail would not have been expressly declared. As far as Wren was a trustee, the deed is revoked; but it was the act of Wren, Ellison being passive.

LORD CHANCELLOR ELDON.—I had no doubt, that, from the moment of executing the first deed, supposing it not to have been for a wife and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interest in that instrument, making the trustees and the author of the deed parties. *I take the distinction to be, that, if you want the assistance of the Court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust: as, upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant. But if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court.* That distinction was clearly taken in *Colman v. Sarrel*,² independent of the vicious consideration. I stated the objection, that the deed was voluntary; and the Lord Chancellor³ went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and cestui que trust, though voluntary, and without good or *meritorious*⁴ consideration; and it is clear, in that case, that, if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the Court would have executed it against the trustee and the author of the trust.

¹ See *Harmood v. Oglander*, 6 Ves. 199, and note.

² 1 Ves. jun. 50; S. C., 3 Bro. C. C. 12.

³ *Thurlow*.

⁴ That meritorious consideration merely will not entitle a volunteer to the aid of equity. See *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; *Dillon v. Coppin*, 4 My. & Cr. 647, overruling *Ellis v. Nimmo*, L. & G. 333, t. Sugd.

[*206] *In this case, therefore, the person claiming under the settlement might maintain a suit, notwithstanding any objection made to it as being voluntary, if that could apply to the case of a wife and children; considering, also, that Mrs. Clavering was an annuitant, and not a mere volunteer. But it was put for the defendant thus—that though the instrument would have been executed originally, if the subject got back by accident into the author of the trust, and was vested in him, then the objection would lie in the same manner as if the instrument was voluntary. I doubt that, for many reasons—the trust being once well created, and whether it would apply at all where the trust was originally well created, and did not rest merely in engagement to create it. Suppose Wren had died, and had made Ellison his executor, it would be extraordinary to hold, that though an execution would be decreed against him as executor, yet, happening to be also author of the trust, therefore an end was to be put to the interest of the cestui que trust. But it does not rest there; for Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed, making him, therefore, a trustee for Ellison himself first, and, after his death, for several other persons; and he has said, he puts that restraint upon his own power, not only that he shall not have a power of revocation whenever he changes his intention, but that he shall not execute that power, nor be supposed to have that change of intention, unless manifested by an instrument executed with certain given ceremonies. My opinion is, that if there is nothing more in this transaction than taking out of Wren the estate clothed with a trust for others with present interests, though future in enjoyment, and that was done by an instrument with no witness, or only one witness, it is hardly possible to contend that such an instrument would be a revocation according to the intention of the party, the evidence of whose intention is made subject to restrictions that are not complied with. The only difficulty is, that the declaration of the trusts in the first instrument could not be executed, the second instrument being

[*207] allowed to have effect. It is said, *a power was placed in Wren, his executors and administrators, not his assigns, if in sound discretion thought fit, to sell and to give a larger interest to the younger children than they otherwise would take. If Wren had not, after the re-assignment, that discretion still vested in him, I think it would not be in the executors of Ellison, and it could not be exercised by the Court, though, *in general cases, trusts will not fail by the failure of the trustee.* But, though the effect would be to destroy the power of Wren, which I strongly doubt, attending to the requisition of two witnesses, I do not know that it would destroy the other interests. I think, therefore, upon the whole, this trust does remain, notwithstanding this re-assignment of the legal estate of Ellison. I do not think, consistently with the intention expressed in the first instrument, and the necessity imposed upon himself of declaring a different intention under certain restrictions, that, if a different intention appeared clearly upon the face of the instrument, the latter would have controlled the former. But I do not think his acts do manifest a different intention. Supposing one witness sufficient, the second deed does not sufficiently manifest an intention to revoke all the

benefits given by the first deed to the children; and it is not inconsistent that he might intend to revoke some, and not all.

As to the will, it is impossible to maintain that the will is a writing within the meaning of the power, considering how the subject is described. The word "residue" there means, that estate of which he had the power of disposing, not engaged by contracts, declarations of trusts, &c. It was necessary for him to describe the subject in such a way that there could be no doubt he meant to embrace that property. Upon the whole, therefore, this relief must be granted; *though I agree, that, if it rested in covenant, the personal representative might have put them to their legal remedies*, he cannot, where the character of trust attached upon the estate while in Wren; which character of trust, therefore, should adhere to the estate in Ellison, unless a contrary intention was declared; and the circumstance of *one witness only, when [*208] the power reserved required two witnesses, is also a circumstance of evidence that he had not the intention of destroying those trusts which had attached, and were then vested in the person of Wren.

The ordering part of the decree, extracted from the Registrar's Book, is thus: "Whereupon, and upon debate of the matter, and hearing the deed of trust dated the 18th June, 1796, read, and what was alleged by the counsel on both sides, his lordship doth declare that the trusts of the said deed, bearing date 18th June, 1796, ought to be performed and carried into execution, and doth order and decree the same accordingly. And it is further ordered and decreed, that it be referred to Mr. Ord, one of the Masters of this Court, to appoint a new trustee or trustees of the premises comprised in the said trust deed, and that the share of the said Nathaniel Ellison of and in the said collieries, and the stock and effects belonging thereto comprised in the said deed, be assigned to such new trustee or trustees so to be appointed, upon the trusts and upon and for the intents and purposes declared by the said deed concerning the same, and such new trustee or trustees is or are to declare the trusts thereof accordingly, and the said master is to settle such assignment; and it is ordered that the said Master do tax all parties their costs of this suit, and that such costs, when taxed, be paid out of the estate of the said testator, and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

In the leading case of *Ellison v. Ellison*, Lord Eldon lays down and acts upon the well-known rule, that, where a trust is actually created, and the relation of trustee and cestui que trust established, a Court of equity will, in favor of a volunteer, enforce the execution of the trust against the person creating the trust, and all subsequent volunteers; although it will not create a trust or establish the relationship of trustee and cestui que trust, by enforcing the performance of an agreement, or by giving effect to an imperfect con-

¹ Taken from the judgment of Lord Justice Knight Bruce, in *Kekewich v. Manning*, 1 De G. Mac. & G. 191.

veyance or assignment in favor of volunteers. The application, however, of this rule, *is by no means free from difficulty, as it is frequently a [209] question of much nicety to determine whether the relation of trustee and cestui que trust has or not been established. It is intended, therefore, in this note, to examine the cases in which equity interposes or refuses its aid in favor of volunteers.

Where there has been an actual transfer of the legal interest in real or personal property by the settlor or his trustees to trustees upon trusts declared in favor of volunteers, these trusts, it is clear, will be enforced in equity against the settlor or his representatives or subsequent volunteers, (*Colman v. Sarrel*, 3 Bro. C. C. 12, 14; S. C., 1 Ves. jun. 50; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 99; *Bill v. Cureton*, 2 My. & K. 503; *Jefferys v. Jefferys*, Cr. & Ph. 138, 141; *Denning v. Ware*, 22 Beav. 184;) even although, as in the principal case, the trust property by accident gets back into the hands of the donor, (*Smith v. Lyne*, 2 Y. & C. C. C. 345; *Browne v. Cavendish*, 1 J. & L. 637; *Newton v. Askew*, 11 Beav. 145. And see *Page v. Horne*, 11 Beav. 227; *Lanham v. Pirie*, 2 Jur. N. S. 753; 3 Jur. N. S. 704;) to whom if it were transferred by the trustees they would commit a breach of trust: *McDonnell v. Hesilrige*, 16 Beav. 346.

There is, however, an important exception from this class of cases, where a legal transfer of property has been made to trustees, for payment of the debts of the owner without the knowledge or concurrence of his creditors. Such a transaction, it has been repeatedly held, does not invest creditors with the character of cestuis que trust, but amounts merely to a direction to the trustees as to the method in which they are to apply the property vested in them for the benefit of the owner of the property, who alone stands toward them in the relation of cestui que trust, and can vary or revoke the trusts at pleasure. Courts of equity, therefore, will not, at the instance of the creditors, who are looked upon as mere strangers, compel the trustees to execute the trusts for payment of debts. Thus, in *Walwyn v. Coutts*, 3 Mer. 707; S. C., 3 Sim. 14, where estates were conveyed to trustees upon trust for the payment of the debts of certain scheduled creditors, who were neither parties nor privies to the deed, Lord Eldon held, that the trust was voluntary, and that it could not be enforced against the owners of the estates, who might vary it as they pleased. So, also, in *Garrard v. Lord Lauderdale*, 3 Sim. 1, where an assignment of personal property was made to trustees for payment of certain scheduled creditors who were parties to, but who neither executed nor were privy to the execution of the deed, Sir L. Shadwell, V. C., although the execution of the deed had been communicated to the creditors, upon the authority of **Walwyn v. Coutts*, held, that they had no right to enforce the trusts of [210] the deed, and he considered that the principle of the two decisions of *Ellison v. Ellison* and *Walwyn v. Coutts* were reconcilable with each other; "because," said his Honor, "I apprehend that Lord Eldon must have considered that, where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely

directing the mode in which his own property shall be applied for his own benefit, and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of showing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers." This case was, on appeal, affirmed by Lord Brougham: 2 Russ. & My. 451. So, likewise, Sir J. Leach, M. R., in *Acton v. Woodgate*, 2 My. & K. 495, held, that a conveyance to trustees for the benefit of creditors, who were neither parties nor privies to it, was revoked by a second conveyance, executed by several creditors, not privy to the first. In *Page v. Broom*, 4 Russ. 6, a debtor had by deed-poll directed the receiver of his estate to pay the interest of a particular debt: it was held by Sir J. Leach, M. R., that, as the deed was executed without consideration, and without the privity of the creditor, no trust was created in his favor. This case was affirmed on appeal by Lord Brougham. See 2 Russ. & My. 214. In *Bill v. Cureton*, 2 My. & K. 511, Lord Cottenham, then Master of the Rolls, with reference to the cases of *Walwyn v. Coutts* and *Garrard v. Lauderdale*, observes, "that these two cases, so far from deciding that a cestui que trust becoming entitled under a voluntary settlement had not a good title against the settlor, proceeded upon this, that the character of trustee and cestui que trust never existed between the creditor and the trustees of the trust deeds, but that the settlor himself was the only cestui que trust, and therefore that he was entitled to direct the application of his own trust fund." In *Gibbs v. Glamis*, 11 Sim. 584, a suit was instituted by A. against B. and C. respecting a sum of 4000*l.* D. was also made a party to the suit; but, having no interest, he disclaimed. A., B., and C. afterwards came to a compromise; in pursuance of which they executed a deed, assigning the 4000*l.* to trustees, in trust to pay D. his costs of the suit, and to divide the rest of the fund amongst A., B., and C. D., though he was not a party either to the compromise or to the deed, filed a bill against A., B., and C., and the trustees, to compel a performance of the trusts and payment of his costs. Lord Cottenham, reversing *the decision of Sir L. Shadwell, V. C., allowed the demurrer of C. for want [*211] of equity, observing, "that the question was, whether the provision for payment of costs gave the party whose costs were so provided for a right to institute a suit as cestui que trust, he having no interest in the fund, not having been a party to the arrangement, and the arrangement having been made between the parties interested in the fund, for their own benefit or convenience; that the present case was not distinguishable from *Garrard v. Lord Lauderdale*, and the other cases which had been cited, in each of which the plaintiff was as much a cestui que trust as the plaintiff in that case was. See also *Ravenshaw v. Hollier*, 7 Sim. 3; *Wilding v. Richards*, 1 Coll. 655; *Law v. Bagwell*, 4 D. & W. 398; *Browne v. Cavendish*, 1 J. & L. 635; *Simmonds v. Palles*, 2 J. & L. 489; and the observations of Sir Edward Sugden in the last case on *Gibbs v. Glamis*; *Smith v. Hurst*, 10 Hare, 30; *Steele v. Murphy*, 3 Moore, P. C. C. 445; *Smith v. Keating*, 6 C. B. 136, 158.

It is clear also, that, in other cases in which creditors are not concerned, a

person not intending to give or part with the dominion over his property, may retain such dominion, notwithstanding he may have vested the property in trustees, and declared a trust upon it in favor of third persons. Thus, in *Hughes v. Stubbs*, 1 Hare, 476, a testatrix drew a check on her bankers for 150*l.* in favor of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of 100*l.*, which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway: the testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the 150*l.* The testatrix afterwards died. In a suit for the administration of her estate, Sir J. Wigram, V. C., held, that no trust was created for the benefit of the legatee in respect of the 150*l.* "The cases," observed his Honor, "on this subject are necessarily of difficulty; but the conclusion to which I feel bound to come is, that the testatrix did not part with her property in the sum in question, or create any trust for the legatee." See also *Gaskell v. Gaskell*, 2 Y. & J. 502; *Paterson v. Murphy*, 11 Hare, 88.

Where, however, a trust in favor of creditors has been communicated to them, it can no longer be revoked by the settlor. This was laid down in *Acton v. Woodgate*, 2 My. & K. 495, by Sir John Leach, M. R., who said, that, in the case of *Garrard v. Lord Lauderdale*, it seemed to have been [*212] considered that a communication by the trustees to creditors *of the fact of such a trust would not defeat the power of revocation by the debtor, but that it appeared to him that such a doctrine was questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised. Other judges have taken the same view as Sir J. Leach, as to the effect of the communication of the deed to the creditors, (see *Browne v. Cavendish*, 1 J. & L. 635; *Simmonds v. Palles*, 2 J. & L. 504; *Kirwan v. Daniel*, 5 Hare, 499; *Harland v. Binks*, 15 Q. B. 713,) which it would seem must be clearly proved, (*Cornthwaite v. Frith*, 4 De G. & Sm. 552;) but where an assignment is made to a creditor in trust for himself and other creditors, it cannot be revoked by the assignor after it has been communicated to the assignee, unless he has done something to show his dissent: *Siggers v. Evans*, 5 Ell. & B. 367, 380, 381. And it seems to be doubtful whether, after the trust has been communicated to some of the creditors, it can after satisfying them be revoked by the settlor as to the other creditors. See *Griffith v. Ricketts*, 7 Hare, 307. The execution, however, of a trust deed for (amongst other things) the payment of creditors does not constitute one of the creditors, who becomes so after the execution of the deed, and was not a party to it, a cestui que trust, entitled to call on the trustee to execute the trusts of the deed: *La Touche v. Earl of Lucan*, 7 C. & F. 772.

Where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to that creditor, irrevocable. A valid trust is created in his favor, and the relation between the debtor and trustee is no longer that of mere principal

and agent, (per Lord Cranworth, V. C., in *Mackinnon v. Stewart*, 1 Sim. N. S. 88.) And that which is true where a single creditor is the cestui que trust, is at least equally so where there are many creditors. Nor does the creditor executing the deed become less a cestui que trust, because he gives nothing to the debtor, as a consideration for the trust created in his favor, or because it was the voluntary, unsolicited act of the debtor to create the trust: per Lord Cranworth, V. C., in *Mackinnon v. Stewart*, 1 Sim. N. S. 88; see, also, *Field v. Lord Donoughmore*, 2 Dru. & Walsh, 630; 1 Dru. & War. 227; *Gurney v. Lord Oranmore*, 4 Ir. Ch. Rep. 470; 5 Ir. Ch. Rep. 436.

And though there is a time limited in the deed within which creditors must execute it, if by accident any of them fail to do so, they will not necessarily, in equity at any rate, should they act under the deed, (*Spottiswoode v. Stockdale*, Sir G. Coop. Rep. 102; **Raworth v. Parker*, 2 K. & J. 163,) or upon the faith of it, (*Nicholson v. Tutin*, 2 K. & J. 18,) be ex- [*213] cluded from the benefit of the trusts, (*Dunch v. Kent*, 1 Vern. 260; *Field v. Donoughmore*, 1 Dru. & War. 227; and see *Lane v. Husband*, 14 Sim. 661,) though they might not be allowed to disturb any dividend already made amongst the creditors, (*Broadbent v. Thornton*, 4 De Gex & Sm. 65;) but the Court, before it permits a creditor who has not executed to take a benefit under a deed, is bound to see that he has performed all the fair conditions of such deed, and if he has taken any step inconsistent with its provisions, he will be deprived of all advantage therefrom, (*Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Drever v. Mawdesley*, 16 Sim. 511; *Forbes v. Limond*, 4 De G. M. & G. 298.)

A creditor who for a long time delays, (*Gould v. Robertson*, 4 De G. & Sm. 509,) or if he refuses, to execute such deed within the time limited, and does not retract his refusal within such time, (*Johnson v. Kershaw*, 1 De G. & Sm. 260,) and a fortiori if he has set up a title adverse to the deed, (*Watson v. Knight*, 19 Beav. 369,) will not be allowed to claim the benefits of its provisions.

The principle according to which property vested in trustees for the purpose of distribution among creditors, is revocable on the ground of its being a mere arrangement for the benefit of the settlor and which he can therefore at any time revoke, will not, it seems, be applied as between the settlor and persons who are purely the objects of his bounty, the former having appointed an agent to administer the bounty, and declared for whom it was intended, (*Paterson v. Murphy*, 11 Hare, 88;) nor to a case where the trust is to come into operation only on the death of its author, and where, subject to the trust for payment of debts, the lands charged are conveyed by way of bounty to a third person, inasmuch as in such a case the settlor must prima facie be understood to be dealing with his property as if he was disposing of it by will, and therefore as contemplating bounty throughout. *Synnott v. Simpson*, 5 H. L. Cas. 121, 139, 141. Lord St. Leonards, however, dissented from the decision in this case, thinking it clearly came within the principle upon which *Garrard v. Lord Lauderdale* and *Walwyn v. Coutts* were decided.

Although there has been no actual transfer of the legal interest in property

to trustees, if the settlor has constituted himself a trustee for volunteers, a court of equity will enforce the trusts. This is well illustrated in *Ex parte Pye*; *Ex parte Dubost*, 18 Ves. 140, 145. In that case M. had, by letter, [*214] directed an agent in Paris to purchase an annuity *for a lady, which was accordingly purchased, but in the name of M., the lady being at that time married, and also deranged. M. afterwards sent to his agent a power of attorney authorizing him to transfer the annuity into the lady's name, but died before the transfer was made. Lord Eldon held, that, although the legal interest remained in M., he had constituted himself a trustee for the lady. "The question," says his Lordship, "involves the point, whether the power of attorney amounts here to a declaration of trust? It is clear that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that, upon an agreement to transfer stock, this Court will not interpose; but, if the party had declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more, and the Court will act upon it. Upon the *documents* before me, it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what *seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.*" And see and consider *Airey v. Hall*, 2 Jur. N. S. 658; *Parnell v. Hingston*, Ib. 854; and *Kiddill v. Farnell*, 5 W. R. 324. In *Wheatley v. Purrr*, 1 Kee. 551, H. O. directed her bankers to place £2000 in the joint names of her children, J. R. W., M. W., and H. W., and her own as trustee for her children. That sum was accordingly entered in the books of the bankers to the account of H. O. as trustee for J. R. W., M. W., and H. W. The bankers gave H. O., as trustee for J. R. W., M. W., and H. W., a promissory note for the amount, with interest at 2½ per cent., and she gave the bankers a receipt for the promissory note. Lord Langdale, M. R., was of opinion that she had constituted herself a trustee for the plaintiffs, her children, and that a trust was completely declared, so as to give them a title to relief.

A declaration by parol of the trusts of personal property will be sufficient to create a trust. Thus in *M'Fadden v. Jenkyns*, 1 Ph. 153, A. had sent a verbal direction to B., who owed him £500, to hold the debt in trust for C., a volunteer; B. assented to and acted upon the direction, by paying C. £10, as part of the trust money. Lord Lyndhurst, affirming the decision of Sir J. Wigram, V. C., reported 1 Hare, 458, held, that a *declaration by parol was sufficient* to create a trust of personal property, and that, as the debtor had assented to and acted upon the direction, a complete and irrevocable trust was impressed upon the money.

Where, however, there is a declaration of trust by parol, if the case be one of doubt or difficulty *upon the words which have been supposed to [*215] have been used, the Court will give weight to the consideration that the words, not being committed to writing in any definite and unquestionable form, may not be the deliberately expressed sentiments of the party: *Dipple v. Corles*, 11 Hare, 183; and see *Paterson v. Murphy*, Ib. 91, 92.

As to what will be considered to amount to a declaration of trust, see *Framp-*

ton v. *Frampton*, 4 Beav. 287; *James v. Bydder*, 4 Beav. 605; *Thorpe v. Owen*, 5 Beav. 224; *Stapleton v. Stapleton*, 14 Sim. 186; *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 38; *Donaldson v. Donaldson*, Kay, 711, 717; *Woodroffe v. Johnston*, 4 Ir. Ch. Rep. 319; *Gray v. Gray*, 2 Sim. N. S. 273; *Ouseley v. Anstruther*, 10 Beav. 461; *Moore v. Darton*, 4 De G. & Sm. 517; *Paterson v. Murphy*, 11 Hare, 88; and see the remarks of Sir John Romilly, M. R., in *Price v. Price*, 14 Beav. 602. The dictum attributed to Lord Cranworth, C., in *Scales v. Maude*, 6 De Gex, Mac. & G. 51, to the effect that a mere declaration of trust by the owner of property in favor of a volunteer is inoperative, and that the Court of Chancery will not interfere in such a case, seems to be unsupported by the authorities.

A mere expression of an intention to divide property with others will not, it seems, be held to amount to a declaration of trust, but will, like a mere promise to give, not be enforced in equity: *Dipple v. Corles*, 11 Hare, 183.

A declaration of trust by the equitable owner of a chose in action vested in trustees will be supported. Thus, in *Collinson v. Patrick*, 2 Kee. 123, a bond, and all sums of money recoverable in respect thereof, had been assigned to trustees, in trust for such intents and purposes, and such person or persons, as E. P., a married woman, should direct or appoint; and, in default of appointment, for her separate use. E. P. afterwards appointed her interest in the bond to certain persons, in order to indemnify them, in case they should not be able to recover the whole of a sum appropriated by her husband, who was their solicitor, and for no other consideration appearing upon the deed. It was objected, that the deed being voluntary, and something requiring to be done by the party creating the trust, it was a trust which could not be executed by the Court. However, Lord Langdale, M. R., held, that a binding trust had been created. "It seems to me," said his Lordship, "that, so far as depended upon the party executing this deed, everything has been done to constitute an executed trust. It is certainly a matter well worthy of consideration how far the peculiar situation of a married woman, entering into such an engagement as the present, by which she binds her separate estate, is not entitled, in a court of equity, to the same *species of protection which [*216] the law gives to persons entering into a legal obligation, and whether a contract of indemnity so entered into should not, in this court, be supported by a valuable consideration. A declaration of trust is considered, in a court of equity, as equivalent to a transfer of the legal interest in a court of law; and if the transaction by which the trust is created is complete, it will not be disturbed for want of consideration. If this had been a transaction resting on an agreement not conferring the legal interest—if it had been an executory contract, this court, in the absence of consideration, would not have given effect to it; but, if what has been done is equivalent to a transfer of the legal interest, the parties in whose favor the trust is created are entitled to have the benefit of it in this court; and I am of opinion that this deed gives an interest to the plaintiffs which does so entitle them:" see also *Tierney v. Wood*, 19 Beav. 330.

Upon the same principle, if the equitable owner of property vested in trustees, as in *Ellison v. Ellison*, assigns it to them, or directs them to apply it

upon trusts declared in favor of volunteers, and the trustees accept and act upon the trusts, they will be enforced in equity. In *Rycroft v. Christy*, 3 Beav. 238, Mrs. Rycroft, the cestui que trust of money in the hands of a trustee, by deed without consideration directed part of the dividends to be paid by him for the maintenance of an infant, a stranger to Mrs. Rycroft, and covenanted to indemnify the trustee, and agreed to allow the same out of the dividends of the trust fund. The trustee accepted the new trust and acted upon the deed. Lord Langdale, M. R., held, that, as there was no further instrument or formality to be executed, from the moment when the direction was signed and accepted by the trustee a valid and executed trust was created, which Mrs. Rycroft could not revoke. So, in *Meek v. Kettlewell*, 1 Hare, 471, Sir James Wigram, V. C., observes, that, if the equitable owner of the property, the legal interest of which is in a trustee, should execute a voluntary assignment of the property, and authorize the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor, and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity. See also *Bentley v. Mackay*, 15 Beav. 12; *Bridge v. Bridge*, 16 Beav. 322; *Donaldson v. Donaldson*, Kay, 711.

It does not, however, now seem to be considered essential to the validity of [*217] the creation of a trust by the beneficial owner of property, that there should be an acceptance or declaration of the trusts by the trustees in whom the legal interest is vested. Thus, in *Tierney v. Wood*, 19 Beav. 330, where land and stock were vested in the plaintiff Tierney, in trust for Wood, the latter signed a document addressed to Tierney, directing that the land and stock should, after his death, be held for the benefit of certain persons. The document was not attested. It was held by Sir J. Romilly, M. R., that an effectual trust within the meaning of the Statute of Frauds had been declared by the beneficial owner, and that the document was not testamentary. "The authorities," said his Honor, "show that the proper person to create the trust in personal property, is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and if disposed to refuse may be compelled to obey it. I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious, that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognized or sanctioned by Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no

interest to the supposed cestui que trust. A declaration of trust in writing, by Tierney, following that of Wood, would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same, and that, consequently, the beneficial owner is the person, by law, enabled to declare the trust."

Nor is notice of the declaration of trust to the cestui que trust necessary: *Tate v. Leithead*, Kay, 658.

A declaration of trust by the owner of property, given by will to trustees, will be invalid if not executed as a will or codicil: *Johnson v. Ball*, 5 De G. & Sm. 85.

*We must, however, carefully distinguish that class of cases in [*218] which the settlor constitutes himself a trustee for volunteers, from another class of cases in which a person has ineffectually attempted, by an imperfect gift, to confer the whole interest upon volunteers or trustees for their benefit; for it has been repeatedly determined, that the most clear intention to confer an interest will not be sufficient to create a trust in favor of a volunteer. The leading case on this head is *Antrobus v. Smith*, 12 Ves. 39. There Gibbs Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth and Clyde navigation: "I do hereby assign to my daughter, Anna Crawford, all my right, title, and interest of and in the inclosed call, and all other calls, of my subscription in the Clyde and Forth Navigation." This not being a legal assignment, Sir S. Romilly argued, "that the father meant to make himself a trustee for his daughter of these shares." But Sir W. Grant, M. R., observed, "Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says, he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case, in which a party has been compelled to perfect a gift, which, in the mode of making it, he has left imperfect. There is locus pœnitentiæ as long as it is incomplete." So, in *Edwards v. Jones*, 1 My. & Cr. 226, where the obligee of a bond signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond, without consideration, to the person to whom the bond was at the same time delivered, Lord Cottenham, upon the authority of the doctrine laid down in *Antrobus v. Smith*, which he said it was impossible to question, held, that the gift was incomplete, and that, as it was without consideration, the Court could not give effect to it. So, also, in *Dillon v. Coppin*, 4 My. & Cr. 647, a voluntary assignment of East India stock and shares in the Globe Insurance Company, by a deed-poll, incapable of passing such property, was held, by Lord Cottenham, not to affect the settlor's interest in the East India stock

and the Globe shares. In *Searle v. Law*, 15 Sim. 95, A. made a voluntary assignment of turnpike^{road} bonds and shares in an insurance and in a banking company to B., in trust for himself for life, and after his death for his nephew. He delivered the *bonds and shares to B., but did not [*219] observe the formalities required by the turnpike Act, and the deeds by which the companies were formed, to make the assignment effectual. Sir L. Shadwell, V. C., held, that on A.'s death no interest in either the bonds or the shares passed by the assignment, and that B. ought to deliver them to the executor of A. "If that gentleman," observed his Honor, "had not attempted to make an assignment of either the bonds or the shares, but had simply declared, in writing, that he would hold them upon the same trusts as are expressed in the deed, that declaration would have been binding upon him; and whatever bound him, would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as cestuis que trust, to take the provisions intended for them through the operation of that deed. He omitted, however, to take the proper steps to make that deed an effectual assignment; and, therefore, both the legal and the beneficial interest in the bonds and shares vested in him at his death." See also *Coningham v. Plunkett*, 2 Y. & C. C. C. 245. *Price v. Price*, 14 Beav. 598; *Scales v. Maude*, 6 De Gex, Mac. & G. 43; *Weale v. Olive*, 17 Beav. 252.

However, assignments both of equitable and legal choses in action, although nothing passes thereby at law, have been held binding in favor of volunteers, where the assignor has done all in his power to make the assignment complete. Thus, in *Sloane v. Cadogan*, Sugd. V. & P., App. No. xxiv., 11th edit., Mr. W. Cadogan, having an equitable reversionary interest in a fund vested in trustees, assigned it to other trustees upon trust for volunteers. It was contended by Sir Edward Sugden, in his argument, that, in order to constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and cestui que trust should be established; that Mr. W. Cadogan did all he could; but that is not enough: that he could not make an actual transfer; that the trustees in whom it was vested would not have been authorized in transferring it of their own authority to the trustees of Mr. W. Cadogan's settlement. "If," he says, "a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding? Certainly not. As the settlement, therefore, was not completely perfected, the Earl could not enforce it." Sir W. Grant, M. R., however, held, that the equitable assignment created a^{perfect} trust. "The Court," [*220] observed his Honor, "will not interfere to give perfection *to the instrument, but you may constitute one a trustee for a volunteer. Here *the fund was vested in trustees*: Mr. W. Cadogan had an equitable reversionary interest in that fund, and he assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here; for when the trust is created, no consideration is essential, and the Court will execute it though voluntary."

In *Fortescue v. Barnett*, 3 My. & K. 36, J. B. made a voluntary assignment by deed of a policy of assurance effected upon his own life and in his own name for 1000*l.*, to trustees, upon trust for the benefit of his sister and her children. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. *No notice of the assignment was given to the assurance office*, and J. B. afterwards surrendered, for a valuable consideration, the policy and a bonus declared upon it to the assurance office. A bill was filed by the surviving trustee of the deed, to have the value of the policy replaced. It was argued by Mr. Pemberton, for the defendant, upon the distinction laid down by Lord Eldon in the principal case, between an actual transfer and a mere covenant to transfer stock, that the assignment of stock by deed, no actual transfer of the stock having been made, and an assignment of a policy of assurance by deed, the policy remaining in the hands of the grantor, stood upon exactly the same footing. But Sir J. Leach, M. R., held, that J. B. was bound to give security to the amount of the value of the policy assigned by the deed. "In the case," observed his Honor, "of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, the Court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. There is a plain distinction between an assignment of stock, where the stock has not been transferred, and an assignment of a bond. In the former case, the material act remains to be done by the grantor, and nothing is in fact done which will entitle the assignee to the aid of this Court until the stock is transferred; whereas the Court will admit the assignee of a bond as a creditor.

"In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor; nor would he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the assurance office. The question here does not turn upon any distinction between a legal and an equitable title, *but simply upon whether any act remained to be done by the grantor, which, to assist a volunteer, this Court would not compel him to do.* [*221] I am of opinion, that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the cestui que trust." See, also, *Godsal v. Webb*, 2 Kee. 99.

Lord Cottenham, in *Edwards v. Jones*, 1 My. & C. 238, in commenting upon *Sloane v. Cadogan* and *Fortescue v. Barnett*, observes, "that in neither of them was any intention expressed by the learned judge to depart from the established rule, but that, in both, the decision turned upon the question of fact, whether or not the relation of trustee and cestui que trust was actually constituted. In neither was it attempted to make an imperfect a perfect gift. In *Sloane v. Cadogan*, the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees of the fund for the cestuis que trust. Sir W. Grant came to the conclusion that it did,

and the consequence was, that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W. Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this court.

Fortescue v. Barnett falls precisely within the same observation, although there are some expressions in it, especially where the learned judge speaks of a bond which has been voluntarily assigned being considered a debt to the assignee, which probably were not intended to convey the meaning they do. . . . There a party had insured a life, and the contract of the office was to pay to the party insuring, his executors, administrators, and assigns, but the practice of the office was stated to be, that, upon an assignment, the office recognized the assignee; and the policy was, therefore, an assignable instrument. The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties; and the party in that case assigned, but the assignee did not give notice to the office, and consequently, the original insurer dealt with the office, received a bonus, and then surrendered the policy. The Master of the Rolls in that case considered, as he naturally would, whether this transaction was not a gift—whether it did not, in fact, confer a title on the assignee; and if it did, then, consistently with all the authorities, he considered that he was bound to give the assignment its full effect; and he [*222] put his decision expressly upon the fact, that the *transaction was complete; that there was nothing further for the donor or the donee to do; that the latter had nothing to ask further from the donor.” His Lordship then adds, “Whether, upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same ground, namely, that, if the transaction is complete, the Court will give it effect.”

Upon the authority of *Sloane v. Cadogan* and *Fortescue v. Barnett*, it has been held, that the assignment of a debt to a volunteer was binding, although nothing passed at law. Thus, in *Blakely v. Brady*, 2 Dru. & Walsh, 311, A. made a voluntary assignment to B. of a note or memorandum in writing, being the acknowledgment of a sum of 1620*l.* then due to him from K., and all interest then due, or which might thereafter accrue due on the foot thereof, upon trust to pay the interest thereof unto A., his executors, administrators, and assigns, for his life, and a period of fourteen months afterwards, and, at the expiration of the said fourteen months, to pay out of the principal some small sums to and amongst certain persons and relations in the deed particularly mentioned; and as to the residue, in trust for B., his executors, administrators, and assigns, for his and their own benefit. The deed also contained a provision, whereby B., his executors, administrators, and assigns, were irrevocably appointed the attorneys of the said A., for the purpose of suing for and recovering the said debts. A. soon afterwards died, without having made any will or other disposition of the property. The administrator of A. refused to allow his name to be used to enable B. to recover the said sum, having actually himself commenced an action for that purpose. Upon

a bill filed by B. to restrain proceedings in the action, and to carry the trusts of the deed into execution, it was held by Lord Plunket, that, as the transaction between A. and B. was complete, the deed, though voluntary, should be carried into execution. "In this case," observed his Lordship, "as between the assignor and assignees, the gift is absolute; and the difference between the cases where something remains to be done, and those in which nothing remains to be done, is so fully established by the authorities which have been cited on both sides in the argument, that it is unnecessary for me to enter into any enumeration of them. The case of *Fortescue v. Barnett*, besides recognizing the general distinction which I have just adverted to, bears directly on the present point. There the assignment of a policy of insurance was held valid and complete, though *the instrument itself was never delivered. [*223]

"It is said, but, in my opinion, most erroneously, that the authority of that case is shaken by the case of *Jones v. Edwards*, before the present Lord Chancellor of England. It seems to me, that he expressly recognizes its authority, and on this principle, that, if the transaction is complete, the Court will give it effect. It is true Lord Cottenham says, that the observation of Sir J. Leach, in *Fortescue v. Barnett*, 'that a bond voluntarily assigned was considered as a debt to the assignee,' was probably not intended to convey the meaning the words might bear; but this observation of Lord Cottenham must, in my opinion, be merely understood as a guard against the supposition, that the mere assignment of a bond, unaccompanied by delivery, or by any other circumstances, would be considered as a debt to the assignee. In the case before Lord Cottenham there was no assignment, but a mere memorandum entered on a bond, attached to another bond, which clearly was never intended to be given to the plaintiff; and he there dismissed the bill, on the ground of the transaction not being complete, and that a further act remained to be done by the donor.

"The case of *Uniacke v. Giles*, 2 Moll. 257, does not resemble this. There the person entitled to a chose in action executed an assignment of it to the defendant in trust for the plaintiff, and did not deliver the deed, but kept it in her possession until her death; and it was held, that the retention of the deed in the custody of the donor made it revocable, and that it had been revoked.

"The decision in *Antrobus v. Smith* cannot be drawn in aid of the defendant's case. There the conveyance was imperfect, never delivered: it was simply an indorsement on a receipt for subscription, and found among the papers of the executrix.

"The present case differs from all these. The assignment as between the donor and donee is perfect; and the only objection is, that the chose in action is not legally assignable. Besides, it is admitted that the original security was, at some time during the life of the assignor, delivered to the assignee; and, in addition to this, the assignment contains a full power of attorney to the assignee, which alone, in my opinion, ought to govern the case.

"It is asked, why does the plaintiff come into this court, if the assignment

is imperfect? The answer is obvious; he comes here because the property is in the defendant, to whom the ecclesiastical court has granted administration, and he is an administrator in trust. Now you may constitute a trustee for a volunteer; and the case of *Sloane v. Cadogan* is directly in point as to that.

[*224] *The only difference is, that, in the present case, the law has created the trust; and in *Sloane v. Cadogan* the trust was created by the act of the donor. See also *Parnell v. Hingston*, 2 Jur. N. S. 854; *Gannon v. White*, 2 Ir. Eq. Rep. 207; *Roberts v. Lloyd*, 2 Beav. 376; sed vide *Sewell v. Mossey*, 2 Sim. N. S. 189."

The remarks however of Lord Langdale in *Ward v. Audland*, 8 Beav. 201, seem to be scarcely consistent with the cases of *Sloane v. Cadogan*, *Fortescue v. Barnett*, and *Blakely v. Brady*, for there his Lordship appears to be of opinion that the mere voluntary assignment of a chose in action is not binding, upon the ground that nothing thereby passes at law, and the transaction is, therefore, incomplete. This also seems to have been the opinion of Sir L. Shadwell, V. C., in *Beatson v. Beatson*, 12 Sim. 291.

In *Ward v. Audland*, W. W., who was possessed of and entitled to certain household goods and effects, a sum of 546*l.* 2*s.* 6*d.*, (the payment of which was secured by a mortgage in fee of certain customary lands,) and a policy of assurance for the sum of 1000*l.* payable after his death, by a voluntary deed assigned to the plaintiff all his household goods, and all sums of money then owing to him, with all policies of assurance and other securities for the same, and all other his personal estate, together with the mortgage deeds and writings relating to the premises, upon trust for W. W., for life, and, after his death, for others; and he gave the plaintiff a power of attorney to get in any sum of money secured on mortgage; and he also covenanted for further assurance. On the execution of the deed by W. W., it was delivered to the plaintiff; but W. W. continued in possession of the furniture thereby assigned, and in receipt of the income arising from the mortgage, and no notice of the assignment was given, either to the mortgagor or to the grantors of the policy of assurance. Lord Langdale, M. R., said: "Supposing the assignment to have been a complete and effectual assignment, there is not only no conflict, but no question nor any difficulty as to the trusts which the plaintiff had to perform. If the property was *legally* vested in the plaintiff, he might have recovered it at law, and applied it on the trusts; if the property was not *legally and effectually* vested in the plaintiff, then, as the deed was voluntary, this court could afford no assistance to the plaintiff in recovering it; and, under these circumstances, the only question between the parties is, what is the *legal* effect of the assignment? The debt and policy of assurance are choses in action *not assignable at law*, and it is plain, that the whole estate and interest of the assignor did not and could not pass to an

[*225] assignee; and I *apprehend, that, in the case of a voluntary deed, neither the assignor nor his executor could have been compelled to permit the assignee to use his name for the recovery of the debt. The assignment was deficient, because it did not vest in the assignee all that the assignor professed, and intended to pass; and no instance, except the case of *For-*

tescue v. Barnett, has been produced, in which this Court has given effect to such an assignment. It does not appear by the report what were the grounds on which Lord Cottenham, in deciding the case of *Edwards v. Jones*, gave the interpretation he did to *Fortescue v. Barnett*; but it is certainly clear, that Sir John Leach did not in that case intend to alter the rule of the Court which was previously established; and it is also clear that the circumstances, by which Lord Cottenham seemed to think *Fortescue v. Barnett* might be explained, are not found in the present case. It appears to me, that neither a voluntary assignment by deed of a mortgage debt, accompanied by a grant, not specifying the particular estate, but of all estates held in mortgage, and by a covenant for further assurance, without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor. With respect to the furniture, the bill claims the legal right to it for the plaintiff; and if he had it, I am of opinion that he ought to have proceeded at law to recover it. With respect to the mortgage, the bill alleges the legal estate to be in the defendants, or some of them, and prays for a conveyance in aid of the voluntary gift. On the whole, I think that the plaintiff is not entitled to any relief, and that the bill must be dismissed, but without costs."

Sir J. Wigram, V. C., also, (1 Hare, 474,) was clearly of opinion, that an assignment under seal of that which did not pass at law by the operation of the assignment itself, unaccompanied by other acts, was no better than a covenant or agreement to assign: see *Meek v. Kettlewell*, 1 Hare, 464. There M., who, in the event of surviving her daughter, and of the death of her daughter without issue, would, as next of kin, be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the *assignment was given [*226] to the trustees. The daughter afterwards died without issue, and the husband filed his bill against the trustees and M., to compel the performance of the trust. Sir J. Wigram was of opinion, upon the authority of the cases of *Colman v. Sarrel*, 3 Bro. C. C. 12, and *Holloway v. Heddington*, 8 Sim. 324, that an assignment under seal of that which did not pass at law by the operation of the assignment itself, stood upon no better ground than a covenant or agreement to assign; and that a voluntary assignment, unaccompanied by any other acts, was not to be regarded as effectual to pass an equitable interest. His Honor therefore held, that the voluntary assignment did not create a trust which equity would enforce; observing, however, that he decided only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest was, did not create a trust in equity, within the principle of the cases relied upon by the plaintiff. This decision, on appeal, was affirmed by Lord Lyndhurst: 1 Ph. 342. See also *Beatson v.*

Beatson, 12 Sim. 281; *Ward v. Audland*, 8 Sim. 571; S. C., C. P. Coop. Rep. 146; 8 Beav. 201.

The recent case, however, of *Kekewich v. Manning*, (1 De Gex, Mac. & G. 176,) must be considered in effect, though perhaps not expressly, as overruling *Holloway v. Headington*, (8 Sim. 324,) *Ward v. Audland*, (8 Beav. 201; S. C., C. P. Coop. Rep. 146; 8 Beav. 201,) and even *Meek v. Kettlewell*, unless that case can be supported upon the ground that it was the assignment of a mere expectancy. The case of *Kekewich v. Manning* is as follows: A lady entitled absolutely to the reversion in stock, *subject to the life interest of her mother* therein, and which stock was standing in the joint names of herself and her mother, assigned her interest in this stock on her marriage, to trustees in trust for herself for life, remainder to her husband for life, and after their decease, in trust for a niece, and for the issue of the marriage and the issue of the niece according to appointment; and in default of issue of the marriage, in trust for the niece of the settlor. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage. It was held by the Lords Justices Knight Bruce and Lord Cranworth, that even if the settlement were voluntary as regarded the niece and not supported by the marriage consideration, (which point, however, the Court did not decide,) the assignment being complete would be enforced by the Court. "Suppose," said Lord Justice Knight Bruce, "stock or money to be legally vested in A. as trustee for B., for life; and subject to B.'s life interest, for C. absolutely; surely it must be competent to C. in B.'s [*227] *lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D. by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity or with reason or expediency to hold the contrary, C. being sui juris, and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D.? It may possibly be thought necessary to the complete validity of such a transaction, that notice should be given to A.; upon that we do not express an opinion.

"Suppose the case only varied by the fact that A. and C. are the trustees jointly, instead of A. being so alone? Does that make any substantial difference as to C.'s power, the mode of making the gift, or the effect of the act, C. not severing nor affecting the legal joint tenancy? C. would necessarily have notice. Possibly it may be thought material that B. should have notice likewise, but upon that we avoid saying anything, beyond referring to *Meux v. Bell*, (1 Hare, 73,) and to *Smith v. Smith* mentioned in *Meux v. Bell*." See also the elaborate judgment of Sir J. Stuart, V. C., in *Voyle v. Hughes*, 2 Sm. & Giff. 18.

It has, however, been held by Sir John Romilly, M. R., in a recent case, that the transfer of an equitable estate in real property to volunteers was invalid. *Bridge v. Bridge*, 16 Beav. 315, 327, 328; but Lord St. Leonards, with reference to this decision, says, it "seems open to re-consideration." Sugd. V. & P. 592, 13th ed.

A distinction has been taken in recent cases by the Master of the Rolls to this effect, that although it is clear that an assignment by deed of reversionary personal property vested in trustees in favor of volunteers will be enforced in equity, yet if, although property be vested in trustees, it is entirely in the power of the assignor so that he could compel a transfer from them, should he neglect to do so, a mere assignment will, in the same manner as if the property had been legally vested in himself, be imperfect, that is to say, not so complete as he could have made it, and will consequently not be enforced by a court of equity. Thus in *Bridge v. Bridge*, 16 Beav. 315, where it appears that a sum of stock was standing in the name of four trustees of a will by the terms of which they were to apply the dividends for the benefit of the plaintiff until he was twenty-five, at which age it was to be paid over to him. On the 10th of February, 1846, the plaintiff attained his age of twenty-one. On the 9th of April, 1847, he executed a voluntary deed by which he directed, (amongst other things,) that the personal estate to which he was entitled under the will, should thenceforth be considered as vested in the plaintiff and *two new trustees, upon certain trusts therein mentioned. The deed also contained a covenant for further assurance. No transfer of [*228] the stock was made to the new trustees. The plaintiff having filed a bill, seeking a declaration that the settlement of 1847 was not binding upon him, it was held by Sir John Romilly, M. R., that as there had been no legal transfer made, and no recognition of the trust by the original trustees, there was no complete trust constituted, and the plaintiff was therefore entitled to a transfer of the stock. "In my view of this particular case," said his Honor, "the question must be regarded in exactly the same manner, whether the plaintiff or a stranger had been the third trustee. This being so, there being four trustees of the will in whom the legal interest was vested, and the beneficial owner having assigned over the funds to these persons, in trust for certain persons as volunteers, no transfer is made to the new trustee so appointed, nor is there any reason, as in *Kekewich v. Manning*, why the transfer should not have been made. In *Kekewich v. Manning*, the original trusts were not exhausted, but the life-estate of the mother continued in the stock, and until her death no transfer could have been made. The assignor had done all she could do. That is not so in this case. The trustees of the deed of settlement did not do anything inconsistent with the trusts which remained to be performed under the testator's will, and the trustees of the will seem not to have been advised to resist making any transfer to the trustees of the deed, until the settlor had attained his age of twenty-five years." So likewise in *Beech v. Keep*, 18 Beav. 285, A., subject to the life-interest of B., was absolutely entitled to a sum of stock, which was standing in the names of two deceased trustees, to the survivor of which A. was sole executor. Under these circumstances, A. by deed voluntarily assigned all her interest in the stock to B., "to the intent that he might be and become present and absolute owner thereof." A. having refused to execute a power of attorney to B., for a transfer of the stock, it was held by Sir John Romilly, M. R., that A. could not be declared by the Court to be a trustee of the fund, nor compelled to transfer

it. His Honor distinguishing the case from *Kekewich v. Manning*, (1 De G. Mac. & G. 176,) considered that it fell within the principle of his own decision in *Bridge v. Bridge*, (16 Beav. 315.) "In the present instance," said his Honor, "it is obvious, there was no outstanding interest except the plaintiff's, and the transfer of the stock ought to have been made, if both parties had been willing to complete the transaction, and if the transfer had been made, the plaintiff's title would have been complete. The argument employed [*229] by the *plaintiff, that having himself the life estate, no transfer could be made without his consent, clearly does not apply, because he would be the absolute owner if this assignment was perfect, and it was throughout his expressed desire to get the transfer completed. The transfer of the stock is, in fact, what the defendant has refused to make, and it is that transfer which the plaintiff has all along been trying to get, and which is now asked, to make the transaction complete."

Notice of the voluntary assignment of an equitable interest or of a chose in action, to the trustees or debtor, according to the recent authorities does not appear to be essential to its validity, although if the trustees or debtor, before notice of the deed, transferred the property or paid the debt, the donee would have no remedy against them. Thus in *Donaldson v. Donaldson*, Kay, 711, the settlor having assigned stock standing in the names of trustees, to other trustees in favor of volunteers, it was held by Sir W. Page Wood, V. C., that as between the donees under the assignment, and the representatives of the assignor, the title of the former was complete, although no notice of the assignment had been given to the trustees in whose names the stock was standing. "The question," said his Honor, "is, whether, notice not having been given to the trustee, the gift could be enforced. As to that, it has been said in some cases that the gift is complete when no further act is required to be done by the donor or donee: and that seems to imply a doubt, whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original cestui que trust for whom they held it; and if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustees before the stock is transferred; and when he has given such notice his title is complete: and unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of the Court against them." See *Roberts v. Lloyd*, 2 Beav. 376.

That courts of equity, as is laid down in the principal case, will not carry into effect a mere voluntary agreement, contract, or covenant to transfer property, see *Cotteen v. Missing*, 1 Madd. 176; *Colyear v. Mulgrave*, 2 Kee. 81; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Denning v. Ware*, 22 Beav. 184. In *Coningham v. Plunkett*, 2 Y. & C. C. C. 245, a person who was entitled to stock, [*230] standing in the names of two trustees, gave instructions to his *attorney to prepare a settlement of it for the benefit of A., B., and C., and

to procure from the trustees a transfer for the purposes of settlement. The settlement was prepared and a power of attorney for the transfer of the stock executed by both the trustees; but the intended settlor died without having seen the settlement, and before the stock was actually transferred. Sir J. L. Knight Bruce, V. C., held, that no trust of the stock was constituted for A., B., and C. See also *Pownall v. Anderson*, 2 Jur. N. S. 857.

A merely meritorious consideration, as a provision for a wife or children, after marriage, will not be a sufficient inducement for a court of equity to lend its aid in enforcing a voluntary agreement or covenant, or in giving effect to an imperfect gift. It might, perhaps, be inferred, from an expression of Lord Eldon's, in the principal case, that a meritorious consideration is sufficient; and Sir Edward Sugden, in the case of *Ellis v. Nimmo*, 1 L. & G., t. Sugd. 333, held, that a postnuptial agreement, in writing, by which a father undertook to make a provision for a child ought to be specifically performed, although founded only on a meritorious consideration. The decision, however, of Sir Edward Sugden, must be considered now as distinctly overruled by Lordottenham, in *Jefferys v. Jefferys*, Cr. & Ph. 138, and *Dillon v. Coppin*, 4 My. & Cr. 647. See also *Holloway v. Headington*, 8 Sim. 324, per Sir L. Shadwell, V. C.

Sir J. Wigram, V. C., in commenting upon the different classes of cases on voluntary trusts, has observed, that "they are perhaps to be reconciled and explained upon the principle that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look beyond the declaration of trust itself, or inquire into its origin, in order that it may be in a position to uphold and enforce it; whereas, an agreement, or attempt to assign, is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the Court; and, where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect: and there is a close analogy for this reasoning in the case of suits to enforce demands arising out of illicit dealings between parties. If, in such cases, the Court finds an account rendered, or other act done by one of the parties, upon which account or act the Court can proceed without investigating the origin of the demand, it will do so. But it will not so proceed where the form of the transaction is such as to oblige the Court to go into the original illegal transaction, out of which the demand arises:" *McFadden v. Jenkins*, 1 Hare, 462. See also *Davenport v. Whitmore*, 2 My. & Cr. 177, and the cases there cited.

Where a voluntary instrument, although effecting no transfer of *property, creates a valid legal obligation, equity will give effect to it. [*231] Thus, where a person executes a bond, (*Hall v. Palmer*, 3 Hare, 532,) or even a promissory note, (*Dawson v. Kearton*, 3 Sm. & Giff. 186,) in favor of a volunteer, he may prove the debt against the assets of the debtor: but it will be postponed in equity to debts by simple contract: *Ramsden v. Jackson*, 1 Atk. 294. A voluntary bond, however, will be preferred to interest upon debts not by law carrying interest payable under the 46th order of August, 1841: *Garrard v. Lord Dinorben*, 5 Hare, 213. And if it be doubtful whether a bond

be voluntary or for valuable consideration, an issue may be directed: *Hepworth v. Heslop*, 6 Hare, 561.

Where a person without consideration covenants to pay a sum of money, if the covenant is complete, and the Court is not called upon to do any act to make it perfect, it will give effect to a trust declared upon the covenant. Thus, in *Clough v. Lambert*, 10 Sim. 174, where a person, by a voluntary deed, for himself, his heirs, executors, and administrators, covenanted to pay an annuity to trustees, upon trust for his wife for her life, Sir Lancelot Shadwell, V. C., was of opinion that the covenant might be enforced by the wife against the executors of her husband, though not as against his creditors, and that the mere intervention of a trustee made no difference. See also *Fletcher v. Fletcher*, 4 Hare, 67, which shows, that, in the event of the trustee refusing or declining to sue on the covenant, equity will assist the cestui que trust, by enabling him to use the deed either at law or in equity. "My opinion," said Sir J. Wigram, V. C., "is, that the plaintiff would be entitled to use the name of the trustee at law, or to recover the money in this court, if it were unnecessary to have the right decided at law, and, where the legal right is clear, to have the use of the deed, if that use is material." In another part of his judgment, his Honor observes, "The rule against relief to volunteers cannot, I conceive, in a case like that before me, be stated higher than this—that a court of equity will not, in favor of a volunteer, give to a deed any effect beyond what the law will give to it. But, if the author of the deed has subjected himself to a liability at law, and the legal liability comes regularly to be enforced in equity, the observation that the claimant is a volunteer is of no value in favor of those who represent the author of the deed;" and his Honor, therefore, in that case, thought, that, as there was no reason for trying the case at law, the decree ought to be for payment of the money due upon the admission of assets of the covenantor. See also *Williamson v. Codrington*, 1 Ves. 511; *Watson v. Parker*, 6 Beav. 283; *Lomas v. Wright*, 2 My. & *K. 769; *Alexander v. Brame*, 19 Beav. 436; and [*232] the observations of Sir John Romilly, M. R., in *Bridge v. Bridge*, 16 Beav. 321.

In *Hervey v. Audland*, 14 Sim. 531, the executors of a person who had entered into a covenant for further assurance in a voluntary settlement having refused to perform it, the Court, in a suit instituted by a third party for the administration of the covenantor's estate, would not permit the covenantee to prove as a creditor under the decree in the administration suit, but gave him leave to bring such action as he should be advised. In the case, however, of *Cox v. Barnard*, 8 Hare, 310, a testator had assigned annuities, mortgage debts, and policies of assurance to volunteers, and entered into the usual covenant for further assurance. No notice of the deed was given in the lifetime of the testator to the mortgagors or grantors of the annuities. It was held, however, by Sir J. L. Knight Bruce, V. C., in a suit to administer the assets of the testator, that the covenant could be enforced against them without recourse to a court of law. "The Court of Chancery," said his Honor, "undertook to administer the estates of deceased persons, and it was the duty

of this Court to do so, if practicable, without sending parties to courts of law; and there was no reason for sending this case to a court of law. He did not say the Court would specifically perform the covenant; but all the covenantee required was damages, and those damages the Court of Chancery could in such a case estimate and give better than a court of law. His Honor said that it was not necessary for him to decide, and he did not decide, whether, without the covenant for further assurance, the voluntary instrument would prevail; but the covenant being there, the Court would fasten upon it, and hold that the assignment operated to bind the estate." See also *Ward v. Audland*, 16 M. & W. 862; *Aulton v. Atkins*, 18 C. B. 249.

Although a court of equity will not, upon a bill filed by a volunteer, give him any assistance, yet, upon a bill filed by any of the parties to a deed from whom any valuable consideration moved, all the trusts will be carried into effect, even those in favor of volunteers: *Davenport v. Bishopp*, 2 Y & C. C. C. 451; 1 Ph. 698. But where two persons for valuable consideration, as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, although either of the two might do so against the other: *Colyear v. Mulgrave*, 2 Kee. 81; *Hill v. Gomme*, 1 Beav. 540; 5 My. & Cr. 250; *Cramer v. Moore*, 3 Sm. & Giff. 141; and see and consider *Kekewich v. Manning*, 1 De. G. Mac. & G. 176; *Heap v. Tonge*, *8 Hare, 90, 103, 104; *Page v. Cox*, 10 Hare, 163, 169; *Harman v. Richards*, 10 Hare, 81, 88. [*233]

When once an instrument creating a valid and complete trust is duly sealed and delivered, the obligation is complete; the detention of the instrument by the grantor does not render it inoperative: *Doe d. Garnons v. Knight*, 5 B. & C. 671; *Exton v. Scott*, 6 Sim. 31; *Hall v. Palmer*, 3 Hare, 532.

A voluntary settlement of real estate, whether freehold, copyhold, or leasehold, will, under 27 Eliz. c. 4, be held fraudulent and void, as against subsequent purchasers for a valuable consideration from the settlor, *even with notice* of the settlement, and although it is a fair provision for a wife and children; and the settlor will not be restrained from selling the settled estates; but, if the trust is complete, the volunteers will be entitled to the execution of it until the sale. (See *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 91, 93; *Buckle v. Mitchell*, 18 Ves. 100; *Metcalfe v. Pulvertoft*, 1 V. & B. 180; *Willats v. Busby*, 5 Beav. 193; *Stackpoole v. Stackpoole*, 4 D. & W. 320.) And the law is the same when the voluntary settlement is made by a married woman: *Butterfield v. Heath*, 15 Beav. 408.

A voluntary settlement, however, will be defeated by a conveyance or settlement for value to the extent only necessary to give effect to the conveyance or settlement for value: *Croker v. Martin*, 1 Bligh. N. S., 573; 1 D. & C. 15; but a bona fide settlement, although voluntary, cannot be defeated by the conveyance for value of the heir or devisee of the settlor. See *Lewis v. Rees*, 3 K. & J. 132, and *Doe d. Newman v. Rusham*, 17 Q. B. 721; overruling *Jones, Lessee of Moffett v. Whittaker*, Longfield & Townsend's Ir. Exch. Rep. 141. And it should be remembered that a deed, apparently voluntary, may be supported by collateral evidence, showing a contract for value: *Pott v. Tod-*

hunter, 2 Coll. 76. And see *Ford v. Stuart*, 15 Beav. 493; *Kelson v. Kelson*, 10 Hare, 385.

The settlor himself cannot come into a court of equity to enforce the specific performance of a contract for the sale of the estate entered into by him after the settlement, (*Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, T. & R. 294;) but a purchaser from him can: *Currie v. Nind*, 5 My. & Cr. 17.

Chattels personal do not come within the stat. 27 Eliz. c. 4; a settlement, therefore, of chattels personal cannot be defeated by a subsequent sale: *Sloane v. Cadogan*, 2 Sugd. V. & P., App. xxiv., ed. 11; *Jones v. Croucher*, 1 S. & S. 315.

But by the stat. 13 Eliz. c. 5, a voluntary settlement of real or personal estate will be void, and may be set aside by the creditors *of the settlor [*234] indebted to the extent of insolvency, or even if he is largely indebted at the time of making the settlement: *Fletcher v. Sedley*, 2 Vern. 490, and note; *Taylor v. Jones*, 2 Atk. 600; *Townsend v. Westmacott*, 2 Beav. 340; *Skarf v. Soulby*, 1 Mac. & G. 364; *Jenkyn v. Vaughan*, 3 Drew. 419; *Re Magawley's Trust*, 5 De G. & Sm. 1; *Holmes v. Penney*, 3 K. & J. 90; *Barton v. Vanheythuysen*, 11 Hare, 126; *French v. French*, 6 De G. Mac. & G. 95; *Clements v. Eccles*, 11 Ir. Eq. Rep. 229.

A voluntary deed executed, pendente lite, for the purpose of defeating any process in the nature of execution, will be set aside in equity: *Blenkinsopp v. Blenkinsopp*, 12 Beav. 568; 1 De Gex, Mac. & G. 495.

The statute 13 Eliz. c. 5, s. 3, enacts that every party to a fraudulent conveyance "shall incur the penalty and forfeiture of one year's value of the said land," "and the whole of the value of the said goods," and "also being thereof lawfully convicted, shall suffer imprisonment for one half-year without bail or mainprise;" and with respect to this enactment, it has been recently held that a defendant may refuse to answer interrogatories which would render him liable thereunder. See *Wich v. Parker*, 22 Beav. 59.

There is a similar clause in 27 Eliz. c. 4.—See sect. 3.

A court of equity will not set aside a voluntary deed or agreement not obtained by fraud, or against public policy, even if it be such as, according to the principles before laid down, it will not carry into effect. Equity stands neutral, and invariably follows the rule thus quaintly laid down in an old case, "that if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly:" *Villers v. Beaumont*, 1 Vern. 101; *Bill v. Cureton*, 2 My. & K. 503; *Petre v. Espinasse*, 2 My. & K. 496; *Page v. Horne*, 9 Beav. 570; 11 Beav. 227; *M'Donnell v. Hesilrige*, 16 Beav. 346.

The principle is well established in this country, that an executory agreement, or an imperfect conveyance, upon a merely voluntary consideration, will not be enforced or aided in equity; *Caldwell v. Williams*, 1.

Bailey's Equity, 175, 176; *Crompton v. Vessee*, 19 Ala. 259; *Hayes v. Kershaw*, 1 Sandford's Ch. 258; *Reid v. Vanarsdale*, 2 Leigh, 560; *Evans v. Battle*, 19 Alabama, 398; *Pinkard v. Pinkard*, 23 Id. 649; and hence, gifts of real or personal estate will be void, unless so far executed as to pass the legal title, or attended with some peculiar circumstance which give rise to a special equity. "It is a clear, general rule," said Chancellor Kent, in *Minturn v. Seymour*, 4 Johnson's Chancery, 498, 500, "that a bill does not lie to enforce a mere voluntary agreement. The language of the books, from the earliest to the latest cases, is uniform in support of the doctrine, that a voluntary defective conveyance, which cannot operate at law, is not helped in equity, in favor of a volunteer, where there is no consideration, nor any accident or fraud in the case. To entitle the party to the aid of this court, the instrument must be supported by a valuable consideration, or, at least, by what a court of equity considers a meritorious consideration, as payment of debts, or making a provision for a wife or child." To the same effect is *Acker v. Phoenix*, 4 Paige, 305, 308. "Voluntary executory agreements," said Henderson, J., in *Dawson v. Dawson*, 1 Devereux, Equity, 93, 99, "receive no aid, either from courts of law or of equity. The parties stand upon their rights, such as they are, and hence it is a maxim, that defective voluntary agreements will not be aided in equity; any reformation of a conveyance being an execution of the original agreement, so far as the conveyance is varied. The same motive, which induces a court to refrain from enforcing an agreement, no part of which

is executed, prevents it from enforcing any part of it. The want of a consideration is therefore universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement." See also, *Banks v. May's Heirs et al.*, 3 Marshall, 435, 436; *Bibb v. Smith, &c.*, 1 Dana, 580, 582; *Darlington v. McCooles*, 1 Leigh, 36, 42; *Tiernan v. Poor et ux.*, 1 Gill & Johnson, 217, 228; *Forward et al. v. Armstead*, 12 Alabama, 124, 127; *Shaw, Guardian, &c. v. Burney et al.*, 1 Iredell's Equity, 148, 150.

That trusts when created and declared, though by a voluntary conveyance or settlement, will be sustained or enforced in equity, is equally well settled; *Wright v. Miller*, 4 Selden, 9; *Andrews v. Holson*, 23 Alabama, 219; and it is thoroughly well settled, that from the moment that such a conveyance is executed, the property vests in equity, in the *cestui que trust*, and cannot be taken away from him, even by the concurrent action of the grantor and the trustee. In *Bunn v. Winthrop*, 1 Johnson's Chancery, 329, a party made a voluntary settlement by deed on his mistress and her child, and retained the deed by him until his death; but the court held that as there was an actual creation of the trust and transfer of the interest, the transaction was valid in equity, although the grantor retained the instrument in his possession. "It will be sufficient," said Chancellor Kent, in delivering judgment, "on this subject of aiding voluntary agreements, to recur to the distinction declared by Lord Eldon, in *Ellison v. Ellison*, (6 Ves. 662,) as being one which reduces this point to something like established rule. If you want,

according to that distinction, the assistance of chancery to raise an interest by way of trust, on a covenant, or executory agreement, you must have a valuable or meritorious consideration; for the court will not constitute you *cestui que trust*, when you are a mere volunteer, and the claim rests in covenant, as a covenant to transfer stock. But if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestui que trust*, though voluntary and without consideration. To the same effect was the observation of Sir Joseph Jekyll, in *Lechmere v. Earl of Carlisle*, (3 P. Wms. 222,) that every *cestui que trust*, though a volunteer, and the limitation without consideration, was entitled to the aid of a court of equity." And this is approved in *Minturn v. Seymour*, 4 Id. 498, 500. See, however, *Perine v. Dunn*, 3 Id. 508, 517. The same principle is placed in a very clear light in the opinion of Gibson, C. J., in *Dennison v. Goehring*, 7 Barr, 175, 178. In that case, a conveyance had been made to a person who himself paid the purchase-money, but the trust was declared for his children; and it was held that the trust, though voluntary, was enforceable. "Equity," said the Chief Justice, "will not enforce a contract to create a trust, though it were under hand and seal; and in this respect it carries the doctrine of *nudum pactum* further than even the law does; but the difference between a covenant to create a trust, and a trust created, is as wide as the difference between a covenant to convey and a conveyance executed. It enforces no contract which does not rest on a valuable, or at least a meri-

torious consideration; but it enforces an executed contract with as much alacrity as the law would enforce it. The reason of the difference in regard to the effect of a seal is, that the interposition of a chancellor is matter of favor; but that the interposition of a court of law, with whom a seal stands for a consideration, is matter of right. While a contract for a trust, therefore, is executory, the trust itself is held to be executory; and it stands on the footing of any other executory contract, in respect to which a chancellor is guided by his apprehension of the justice of the contract in applying or refusing his power to the execution of it; but when the legal estate has passed by a conveyance in which a trust is distinctly declared, the trustee will not be allowed to set up want of consideration to defeat it." In *Tolar v. Tolar*, 1 Devereux, Equity, 456, a voluntary deed to a child, had been destroyed by the donor before registration; and a court of equity compelled the grantor to convey the same property by another deed.—The application of this distinction is, certainly, in some cases, a matter of nicety; see *Dawson v. Dawson*, Id. 93; S. C. 396.

There can be no doubt, that, in this country, under a voluntary assignment for the benefit of creditors, although the assignee, before the creditors have assented to it, is rather the trustee of the debtor than of the creditors; *Brooks v. Marbury*, 11 Wheaton, 79, 87; yet the latter may claim the benefit of such an assignment, and may enforce it in equity, even if they are not parties to the conveyance, and had no knowledge of it at the time it was made. This was settled in *Moses v. Murgatroyd*, 1 Johnson's.

Chancery, 119, 129; *Shepherd v. M'Evers*, 4 Id. 136, 138; *Nicoll v. Mumford*, Id. 523, 529: and has been recognized and adopted in other states; *Ward et al. v. Lewis et al.*, 4 Pickering, 518, 523; *New Eng. Bank v. Lewis et al.*, 8 Id. 113, 118; *Pingree v. Comstock*, 18 Id. 46, 50, 51; *Ingram v. Kirkpatrick*, 6 Iredell, Equity, 463; *Stimpson v. Fries*, 1 Jones, Eq. 156. In *Weir and another v. Tannehill and others*, 2 Yerger, 57, the complainants filed a bill setting forth that they were creditors of T., who had conveyed personal estate to trustees to be distributed by them among his creditors, and that the trustees would not pay them, nor show them the trust deed, and they feared the parties to the deed would cancel it, or otherwise deprive the complainants of the benefit of it; and to this there was a demurrer. "It struck me at first," said Haywood, J., in delivering an opinion, that the demurrer should be overruled, "that as these complainants were not parties to the deed of assignment, and were not concluded by it, and might still sue the debtor and recover at law, and as they had acquired no lien on the estate, as judgment-creditors who had taken out execution, that therefore, they had no right to this fund, and that the trustee was answerable for a breach of trust only to the maker of the deed of assignment. But I am now satisfied from the authorities, (from Johnson's Chancery Reports,) shown to me by the counsel, that those creditors have a lien upon the fund, though no parties to the deed." An assignment of this kind is not revocable after it has been communicated to the creditors; *Galt v. Dibrell*, 10 Id. 147, 158; and see *Robertson et als. v. Sublett et al.*, 6

Humphreys, 313, 316; nor, as it would seem, after it has been delivered or placed on record for their benefit; *Wilt v. Franklin*, 1 Binney, 502; *Stimpson v. Fries*, 1 Jones, Eq. 156; unless they are shown to have dissented; assent being, in general, presumed to be that which confers a benefit; *M'Kinney v. Rhoads*, 5 Watts, 343. The subject is examined with some care by Johnston, Ch., in *Tennant v. Stoney*, 1 Richardson's Equity, 223, 253, and a view taken of the English cases, which appears to be satisfactory. "It is impossible," said the Chancellor there, "to put a deed, made with the motive of securing creditors, upon precisely the same footing with one creating a trust for pure volunteers. But taking them as such, the case of *Ellison v. Ellison*, sustains the position, that wherever the instrument effectually constitutes a trust, even for volunteers, they may enforce it. The same doctrine was held by the same great Chancellor in *Pulvertorft v. Pulvertorft*. . . . The difficulty, in subsequent cases, has been to discover upon what principles, consistent with his own decisions in *Ellison v. Ellison*, and *Pulvertorft v. Pulvertorft*, the authority of which has been constantly acknowledged, Lord Eldon could have rested his judgment (in *Walwyn v. Coutts*.) Sir Lancelot Shadwell, in commenting upon it in *Garrard v. Lauderdale*, supposes that the principle of the case is, that where a debtor, for his own convenience, makes a disposition between himself and a third person, constituting him trustee as between themselves for the payment of his debts, and this without concert with or notice to his creditors, he may countermand it. Lord Broug-

ham, before whom the last mentioned case afterwards came, says of the instrument in *Walwyn v. Coutts*, that it was not so much a conveyance, vesting a trust in A. for the benefit of the creditors of the grantor, but rather an arrangement made by a debtor for his own personal convenience and accommodation, (for the payment of his own debts, in an order prescribed by himself,) over which he retains power and control. Upon these views the authority of *Walwyn v. Coutts* was sustained in *Garrard v. Lauderdale*; and upon the same principle the latter case was also itself decided. It will be seen at once, that the application of the principle depends upon the construction of the instrument, and the intention with which it was executed. If it appear that the trustee was not intended to be the trustee of the creditors, but of the grantor, his mere agent, and that the conveyance was executed simply with a view to enable him to perform the acts directed, these cases say the deed is revocable; though it is not clear that it could be revoked after the transaction has come to the knowledge of the creditors, and against their wish, expressed before the revocation. This is the interpretation put upon these cases, by Sir C. Pepys, in *Bill v. Cureton*. . . . I have thus brought together the two decisions of Lord Eldon, in which the rule is firmly laid down on the one hand, and the cases, one of them decided by himself, which have been supposed to oppose it on the other, and I have shown that the rule was not intended to be shaken by these cases." See also the view taken of *Walwyn v. Coutts*, and *Garrard v. Lauderdale*, in *Cunningham v. Free-*

born, 3 Paige, 557, 560. (See 1 American Leading Cases, 66, 4th ed.)

It is stated in the preceding note of the English editor, that "a merely meritorious consideration, as a provision for a wife or children, after marriage, will not be a sufficient inducement for a court of equity to lend its aid in enforcing a voluntary agreement or covenant, or in giving effect to an imperfect gift." But this is believed to be a hasty inference from the decisions there referred to, and not to be entirely correct. The state of the authorities on the subject, is thus. In *Ellis v. Nimmo*, Lloyd & Goold, t. Sugden, 333, Lord Chancellor Sugden, after a careful review of the authorities, decided that the meritorious consideration of providing for a child, was sufficient to lead to the enforcement, in equity, of an executory contract, as against the person contracting. At the end of the case, p. 349, the reporter adds, "The decree in this case was affirmed by Lord Plunket on rehearing, but upon other grounds." *Holloway v. Headington*, 8 Simon, 324, was wholly unlike this case, and went upon other grounds, but it contains the following remark by Vice-Chancellor Shadwell: "However high the authority may be of the Lord Chancellor who decided *Ellis v. Nimmo*, that cause was reheard by his successor, who rejected the grounds of the former decision and decided in the same way, but on different grounds. Therefore, there is the authority of one Lord Chancellor in its favor, and the authority of another Lord Chancellor against it. Consequently, it is not a decision that binds." But this is, obviously, an extreme and inaccurate statement of the Vice-Chancellor.

The mere fact that Lord Plunket, on a rehearing, affirmed the decree on other grounds than those on which Sir Edward Sugden had placed it, affords no inference that Lord Plunket's authority was thereby given against the principle which Sir Edward Sugden had established. This supposed rejection by Lord Plunket, and this mistaken observation in *Holloway v. Headington*, may, therefore, be set aside as not in the least degree impairing the force of the well-considered and direct decision of Lord Chancellor Sugden. The next case is *Dillon v. Coppin*, 4 Mylne & Craig, 646, 671, before Lord Cottenham. There, a father had executed a deed, imperfectly assigning certain shares of stock for the benefit of his daughter, but had retained the deed in his possession during his life, and had endorsed upon an envelope on the deed that it was to be given to his daughter at his death. Now, the difficulty in the way of enforcing this settlement, was the same as in *Antrobus v. Smith*, 12 Ves. 39; that the case did not show an absolute intention or agreement of the parent to make the transfer. It was an imperfect transfer, but under circumstances which did not indicate an attempt or design to make a present transfer, and which, therefore, equity could not turn into a contract to transfer. "It is not necessary," said the Lord Chancellor, "to look further than the case of *Antrobus v. Smith*. There, the gift was in favor of a child, but it was voluntary and imperfect, and the instrument was found in the father's possession. I believe that case to have been well decided, and nothing which has since occurred affords any reason for departing from the principle upon which it is founded. It is also to be observed

in this case, that the envelope proves that the father did not intend that the instrument should operate till after his death, though it professes to be an immediate assignment: it is not, therefore, to be presumed that he even parted with the possession of it." It must be observed, also, that this case was between one child and other children of the same testator, so that the meritorious consideration operated on both sides, and was evenly balanced. Lord Cottenham must have conceived that he was not overruling *Ellis v. Nimmo*, for he does not allude to that decision, in delivering judgment. Moreover he expresses his entire approbation of *Ellison v. Ellison* and *Pulvertoft v. Pulvertoft*, in both of which Lord Eldon recognizes, or inclines to recognize, the principle, that equity will give aid in the case of a meritorious consideration in favor of a wife or child. The remaining case is *Jefferys v. Jefferys*, 1 Craig & Phillips, 138, 141, where a father had covenanted to surrender certain copyholds to the use of his daughter, and had afterwards devised a part of them to his wife, who after his death, was admitted. This bill was brought by the daughters to have the settlement decreed against the widow. "I have no doubt," said Lord Cottenham, "that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in *Ellis v. Nimmo* is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case, in which I had occasion

to refer to that decision." On another day, he said that he had looked at the case alluded to, (*Dillon v. Coppin*,) and that he saw no reason for altering the opinion he had before expressed. Now, here, the case was between two classes equally meritorious in respect to consideration; daughters on one hand, and a widow on the other. The case of *Ellis v. Nimmo*, was between a daughter and the father who made the contract. Considering then, that the direct decision of Lord Chancellor Sugden stands supported by Lord Eldon's recognition of the same principle, and not opposed by any decision whatever, it may be stated as the result of the English authorities, that equity will aid a defective transfer which was intended and meant to be a complete present transfer, and probably will enforce an executory agreement, upon the inducement of a meritorious consideration, that is to say, in favor of a wife or child, and against one not standing in one of those relations, such as a brother, or other collateral connection, or against the person himself contracting: but it will not interfere between persons standing upon the same meritorious consideration, that is, being the children, or children and widow, of the person whose estate is in question. The former part of this rule may be considered as established by *Ellis v. Nimmo*; and the latter part is the just result of *Jefferys v. Jefferys*.

In this country, it may be considered as the prevailing, and probably the settled, doctrine, that a provision for a wife or child is a sufficient meritorious consideration to lead to the enforcement of an executory agreement or trust, at least where the instrument is under seal; *Shepherd v. Bowie*, 4

Maryland Ch. 133; 9 Gill, 32; *Harris v. Haines*, 6 Maryland, 435. This point was decided in *M'Intire v. Hughes*, 4 Bibb, 186, in the case of an agreement under seal by a father to convey land to his son; and in that State, (Kentucky,) since a statute has placed sealed and unsealed instruments of an executory character upon the same footing, the same principle has been established in relation to agreements not under seal; *Mahan, &c. v. Mahan*, 7 B. Monroe, 579, 582. See, also, *Bright's Ex'rs v. Bright*, 8 Id. 194, 197. In *Dennison v. Goehring*, 7 Barr, 175, 179, it was thought that an executory agreement to create a trust in favor of the children of the grantor, was upon a consideration that would be recognized in equity as against the grantee. "Natural affection," said Gibson, C. J., in that case, "though not a valuable, is a meritorious consideration; on the foot of which, an agreement by a father to secure a provision for his child has been enforced in equity, by reason of the obligation of parents to provide for their offspring. Thus, a covenant with a son to renew a lease, was enforced in *Husband v. Pollard*, cited 2 P. W. 467; and in *Goring v. Nash*, 3 Atk. 186, a father's covenant to settle an estate on his son was specifically decreed. In such a case, a legitimate child is not held to be a volunteer, though it was held in *Fursaker v. Robinson*, Prec. in Chan. 475, that a bastard is so. In corroboration of the principle, may be mentioned those cases in which equity has supplied the surrender of a copyhold, and a defective execution of a power in favor of a legitimate child."

But this principle of a meritorious

consideration reaches only to the cases of a wife and a child : it does not extend to any collateral kin, nor, probably, to a descendant more remote than a child. In *Buford's Heirs v. McKee, &c.*, 1 Dana, 107, a bill was filed to have specific performance of a voluntary covenant by an uncle to convey land to his nephew ; but it was dismissed for want of a sufficient equitable consideration. "In exercising the discretion, which a chancellor retains to himself, over applications for the specific performance of contracts," said the court in that case, "it has always been deemed an essential pre-requisite, that the contract he is called upon thus to enforce, should be based upon, either a valuable, or what is termed a meritorious consideration. The moral obligation to provide for a wife or a child, constitutes such a meritorious consideration as will induce a specific performance of an agreement in their favor, and some of the cases have declared, that grandchildren come within the rule ; but we have been able to find no authoritative case where a voluntary agreement has been specifically enforced in favor of a collateral relation, such as a nephew, unless there was some other controlling circumstance besides the mere affinity. The cases where relief has been extended in favor of collaterals, either expressly recognize the doctrine, that some additional circumstance is necessary to call forth the interposition of the chancellor in their behalf, or by the stress laid upon such additional and controlling circumstance, indicate clearly that such is the rule of the court. . . . In an analogous class of cases, it seems to be well established, that a defective surrender will be supplied only in favor

of three descriptions of persons, viz. creditors, wife, and children." In *Hayes v. Kershaw*, 1 Sandford, Ch. 258, also, it was decided that a covenant for a future conveyance, without a valuable consideration, in favor of the issue of a nephew and niece could not be enforced in equity. "In the exercise of the discretion which courts of equity still have in decreeing specific performance of agreements," said the Assistant Vice Chancellor, "they uniformly decline to enforce voluntary covenants. . . . Covenants and agreements founded upon a good consideration, or as oftentimes expressed, on a *meritorious* consideration, are, however, upheld and enforced specifically in this court. And it has been a mooted question whether collateral consanguinity, as that of a brother, nephew, niece, &c., was not a meritorious consideration. I think it is now settled upon authority that it is not. . . . In the case before me, there was no moral obligation to provide for a wife and children, or a parent ; and there was therefore no such good or meritorious consideration, as will induce this court to decree the performance of the covenant in the sealed instrument in question." The observation of Chancellor Kent, in *Bunn v. Winthrop*, 1 Johnson's Ch. 329, 337, that the duty of providing for a mistress and illegitimate child formed a consideration, must be understood of the case then before the court, and as meaning a consideration to support an executed trust.

It seems, also, that, in the case of an executory agreement, equity will not decree a specific performance, even in favor of a wife or child, where there is not a valuable con-

sideration, unless the instrument is under seal; *Kennedy v. Ware*, 1 Barr, 445. The doctrine appears to be, that there must exist a valid and obligatory contract at law, as a preliminary basis to any equitable interference, and then that equity grants its extraordinary aid only where there is an actual consideration, valuable or meritorious. In *McIntyre v. Hughes*, 4 Bibb, 186, 188, the court said, "Whether, if the contract was not by deed, a court of equity would, where there was no other consideration than that of blood, decree its specific execution, is not material to be decided; nor is the court to be understood as having given any opinion upon that point." But, as before remarked, since the distinction in executory agreements between sealed and unsealed has been abolished, unsealed agreements, where the consideration appears in the agreement, will be enforced; *Mahan, &c. v. Mahan*, 7 B. Monroe, 579. In *Caldwell v. Williams*, 1 Bailey's Equity, 175, 176, it is declared, that although some agreements which are termed voluntary, are executed by a court of equity when made in favor of a wife or children, yet this is only where the agreement is under seal, which imports a consideration and renders it valid at law; and that there is no instance of an agreement being enforced, which is not only voluntary in the equity sense of the word, but is also *nudum pactum* at law. See, also, *Pennington, Adm'r of Patterson v. Gitting's Ex'or*, 2 Gill & Johnson, 209, 218; *post*, vol. 2, note to *Row v. Dawson*.

It is proper to observe that as marriage is a valuable consideration, equity will enforce gifts made in contemplation of, and followed by mar-

riage; *Daval v. Getting*, Gill, 38; *Gough v. Crane*, 3 Maryland Ch. 119; 4 Id. 316; and the same course will be pursued when a gift of land, which fails to pass the legal title, is followed by expenditures induced by and made on the faith of the gift; *post*, note to *Lester v. Foxcroft*. In regard to the subject of voluntary conveyances as against creditors and purchasers, and the subject of assignments for the benefit of creditors, see the notes to *Sexton v. Wheaton*, and *Thomas v. Jenks*, in 1 American Leading Cases, p. 36, and p. 65, 4th ed.

[The view taken above, was cited and followed in *Jones v. Obenchain*, 10 Grattan, 259; and it was said that equity will lend its aid to support a transfer, which has its origin in a desire to provide for a man's wife or children, and is, consequently, founded upon a meritorious consideration. In this case, however, the gift was complete as far as it lay in the power of the grantor to complete it, a deed having been executed, which would have passed the estate in question, had it not been for the technical rule, which forbids a conveyance by a husband to his wife; and the court expressed no opinion as to what the result would have been had the seal been wanting; had the instrument been executory; or had there been a want of a meritorious consideration. This case is fully sustained by that of *Hayes v. Kershaw*, 1 Sandford's Ch. 258, while that of *Kekewich v. Manning*, 12 Eng. Law & Eq. 120, goes still further by deciding, that equity will sustain a formal deed or transfer of stocks or other *choses in action*, even where the transaction is not only voluntary, but destitute of any valuable or meritorious consideration, and

induced solely by the desire of conferring a benefit on one whom the assignee has selected as a fit recipient of his bounty. The parties who were benefited by the gift, in this instance, were sons of the giver, and would consequently have had a standing in equity before the statute of uses, for the purpose of enforcing a covenant to stand seised; but the case was decided on the more general ground, that every man is entitled to dispose of his property as he pleases, with or without consideration, and that a gift ought not to be allowed to fail for want of an ingredient, which it necessarily wants as a gift, and cannot have without changing its nature and becoming a sale. The same view was taken in *Voyle v. Hughes*, 23 Eng. Law & Eq. 271, of the assignment of a reversionary interest in stock, the court saying that executed and executory agreements are, as far apart in equity as at law, and that although equity may construe a deed of gift, which fails of effect as a present transfer, as if it were an executory contract, it only does so for the purpose of effectuating the intention of the parties and not because it confounds two things which are essentially different. The remark thus made is worthy of attention, and is necessary to prevent the process by which equity differentiates the transactions of life, treating executory contracts as if they were grants, and grants, fully executed, as if they were contracts, from being mistaken for the transmutation of grants into covenants, and of covenants into grants. The result of the cases would, therefore, on the whole seem to be, that an assignment, which has been completed so far as the circumstances of the case, and the nature of the thing transferred will permit, may

be valid in equity, notwithstanding the absence of a consideration; but that a consideration is essentially necessary to give validity to an executory transfer; *Cox v. Sprigg*, 6 Maryland, 274. Whether a seal is requisite in the former case, and whether a meritorious consideration will suffice in the latter, are more doubtful questions, which still remain open for adjudication.

Chancery has always held a seal unnecessary, to raise a use in land on the one hand, when value is given, and esteemed blood or an antecedent marriage insufficient on the other, without a seal; *Denison v. Goehring*, 7 Barr, 175; 2 Am. Lead. Cases, 158, 742, 4th ed.; Williams on Real Property, 150: although any tie of blood, however remote, may give force and effect to a sealed instrument; Cornish on Uses, 65; Shepherd's Touchstone, 512. A similar view has been taken in some of the cases, with regard to the equitable assignment of *choses in action*, and a seal held essential, unless the consideration is valuable; *Cox v. Sprigg*; *Kennedy v. Ware*, 1 Barr, 445. But the modern decisions tend to qualify and enlarge the ancient doctrine, by dispensing with a seal where the consideration is meritorious, and holding that blood will not operate as a meritorious consideration, unless it flows in the veins of the donor's children, or at farthest of his grand-children or other direct descendants, *ante*; *Hayes v. Kershaw*, 1 Sandford's Ch. 258; while the English authorities take the ground, that no consideration can give effect to an agreement to assign, which falls short of being valuable, and does not consist of money or of that which, like marriage, is money's worth; although

an executed or completed gift or transfer, may be good in equity, notwithstanding its insufficiency to pass the title at law. An attempt to reconcile the cases on this point, *ante*, would obviously be fruitless; but common sense would seem to require, that if equity will interfere to sustain gifts of *choses in action* in any case, in the absence of a consideration, it should do so whenever the intention to make a present gift is plain, as distinguished from a mere promise or purpose of giving, without regard to the period at which the right given will vest in possession, or whether the gift is put in the form of a declaration of trust by the donor, or of an assignment to a third person in trust for the beneficiary; *Voyle v. Hughes*; *Henderson v. Henderson*, 21 Missouri, 379, 384; *Gilchrist v. Stevenson*, 9 Barbour, 9. To say, as did the Vice-Chancellor in *Searle v. Law*, *ante*, 312, that the assignment of a *chose in action* in trust was void, although a declaration of trust would have been valid, is to fetter the course of equity by distinctions purely technical, and not warranted by, or founded in reason. If, as may well be the case, justice and right require that the owner of a debt should have the power of bestowing it on those whom he desires to aid or favor, then the inquiry should be, has he done enough to manifest his intention; and if this question be answered in the affirmative, equity should intervene without waiting for further evidence.

What evidence of intention should be deemed requisite and sufficient, is not easy to determine; but we may doubt whether a court should be satisfied with anything short of a transfer of the legal title, when such a transfer is possible; the mode which the law has

provided for making a grant, being, as it would seem, the only one which should be recognized by equity when the question is whether a grant has been made, and not whether there is an obligation to make it. Thus, the most express words of gift would, probably, be held insufficient to confer an interest in land, in the absence of a consideration, unless the proper and usual means were taken to pass or confer a title; and the same rule should, perhaps, be applied to stocks, promissory notes, and other securities which are in their nature negotiable, and, therefore, susceptible of being transferred at law, without the aid of equity; *Pennington v. Getting*, 2 Gill, 688. When, however, the law neither prescribes nor provides the means of giving, as in the case of debts not negotiable, equity may well supply the want of a power, which every man ought, as it would seem, to have over all his property, whatever may be its nature, and sustain the transaction as a gift, whenever there is a manifest intention to give.

Form should, it would seem, make little difference in a class of transactions, which all equally and necessarily fail to satisfy or comply with the forms and requisites of the law, and the better opinion would, consequently, seem to be, that as the presence of a seal gives no legal validity to the transfer of a *chose in action*, its absence should take nothing away in equity. When, however, instead of a present gift or transfer, there is a promise or covenant to give, or a mere expression of an intention that the donee shall have that, subsequently, which the donor reserves to himself, or keeps within his own control or disposition, for the time being, the

question becomes one of contract or agreement, and a consideration is essentially necessary to give force to that which would otherwise be an uncompleted gift; *Carpenter v. Dodge*, 20 Vermont, 595; *Henderson v. Henderson*, 21 Missouri, 379, 384; *Cox v. Sprigg*, 6 Maryland, 274. Hence the assignment of a debt not sustained by a consideration, or by the delivery of the instrument by which the debt is evidenced, will be invalid, both at law and in equity; *Hatch v. Davis*, 3 Maryland Chan. 266; *Carpenter v. Dodge*; unless an instrument of gift be executed and delivered, as a substitute for the delivery of the evidence of the debt.

Much has been said, and many distinctions have been taken, as to when a delivery or transfer to a third person, will perfect a gift or confer an equitable interest on the donee. The delivery of a note to one man, with instructions to collect it and apply the proceeds for the benefit of another, has been held to confer a mere authority, which will not operate as a gift until executed, and which may be revoked at any moment before final execution, by the donor; *Thompson v. Dorsey*, 4 Maryland Ch. 149; but the assignment of a mortgage by a writing duly endorsed in trust for the children of the assignee, accompanied by

a delivery of the mortgage, will operate as an irrevocable gift, which cannot be annulled by a re-delivery to the assignor without the consent of the children; *Gilchrist v. Stevenson*, 9 Barbour, 9. In *Withers v. Weaver*, 10 Barr, 391, however, the effect of a delivery of a certificate of deposit to a third person, in trust for the son of the donor, was held to be annulled by proof of a declaration by the donor, at the time of the delivery, that if he wanted money at any time, the trustee should pay him what he required, and deduct the amount, after his death, in settling with his son; and the court would seem to have thought that a gift cannot be valid, unless the thing given is handed over directly to the donee, or, to some one who receives it as his agent, free from the control and authority of the donor.

It is proper to add, that executory words may operate as a grant, and be valid without a consideration, if the purpose plainly is to make a gift, and not to enter into a covenant or contract; *Hayes v. Kershaw*, 1 Sandford's Ch. 258; both law and equity looking to the intention with which instruments are executed, and viewing language as important only as a key to intention; *Krider v. Lafferty*, 1 Wharton, 303, 305.]

VENDOR'S LIEN.

[*235]

*MACKRETH v. SYMMONS.

MAY 13, 14, NOV. 26, 1808.

REPORTED 15 VES. 329.

VENDOR'S LIEN FOR UNPAID PURCHASE-MONEY.]—*Vendor's lien for purchase-money unpaid, against the vendee, volunteers, and purchasers with notice, or having equitable interests only, claiming under him, unless clearly relinquished, of which another security taken and relied on, may be evidence, according to the circumstances, the nature of the security, &c.: the proof being upon the purchaser: and, failing in part upon the circumstances, another security being relied on, may prevail as to the residue.*

As to marshalling the assets of the vendee, by throwing the lien upon the estate, quære.

THE bill stated, that, in the years 1783 and 1784, the plaintiff was indebted to John Manners in several sums, amounting in the whole to £13,500; for which sums John Martindale, as surety, joined the plaintiff in bonds. In 1790, Martindale, having, upon a settlement of accounts with the plaintiff in 1785, taken credit for payment to Manners of £3000, undertook to discharge the remaining £10,500; and they settled an account accordingly. Other accounts were afterwards settled between them—the last in February, 1792: upon which a balance of £54,000 was due to Martindale, including 10,393*l.* 17*s.*, the value of annuities granted by the plaintiff; against which Martindale agreed to indemnify the plaintiff, in consideration of the plaintiff's agreeing to pay him the amount. A bond for £20,000 was given accordingly; and a mortgage in fee was executed by the plaintiff to Martindale for the balance of £54,000.

[*236] By indentures of lease and release, dated the 30th and *31st of October, 1793, reciting an agreement by the plaintiff to sell the reversion of the mortgaged estates to Martindale, which was valued at £60,000, composed of the principal and interest due upon the mortgage, those estates were conveyed to Henry Martindale and his heirs, to the use of the plaintiff for life, with remainder to John Martindale in fee.

The bill further stated, that John Martindale *did not, according to his undertaking, pay the sum of £13,500 to Manners nor the value of the annuities;* which sums constituted part of the consideration for his purchase of the reversion of the estate. In September, 1797, a commission of bankruptcy issued against him, under which Manners' representatives proved the debt upon the bonds, and received dividends; the plaintiff being obliged to pay the remainder of the debt on account of those bonds, being 14,128*l.* 3*s.* 9*d.*, besides costs, and several sums on account of the annuities.

John Martindale, before his bankruptcy, had contracted to execute a mortgage to the defendant of the reversion comprised in the indentures of 1793,

and the plaintiff, claiming a lien upon the estate for the payments he had made in consequence of Martindale's failure to fulfil his engagements, gave notice to the assignees under the commission. In 1798, Symmons obtained a decree, that the assignees should execute a mortgage of the reversion to him, expressly without prejudice to the plaintiff's claim; and afterwards filed a bill of foreclosure against the assignees, and obtained a decree; Mackreth not being a party to that suit. *The legal estate was vested in Coutts*, as a trustee, under a conveyance by Mackreth and Martindale in 1793, to secure annuities of £2000.

The bill, filed by Mackreth, prayed a declaration, that the plaintiff has a lien upon the reversion of the estates, sold to Martindale and mortgaged to Symmons, for the payments he had been obliged to make, and those sums which he may hereafter pay in respect of the annuities, &c.

The defendant, Symmons, by his answer, denied that he had any notice, prior to his entering into the agreement *with Martindale, that the plaintiff had not received full consideration; and submitted that he [*237] had no lien.

Sir *Samuel Romilly* and Mr. *Wriottesley*, for the plaintiff.—The equitable lien of a vendor upon the estate sold for the purchase-money, as against the vendee, and even though a bond was taken, is established by a great number of cases, from *Chapman v. Tanner*,¹ to *Nairn v. Prowse*.² In *Austen v. Halsey*,³ your Lordship considered it as clearly settled, except where upon the contract evidently the lien by implication was not intended; and the case of *Hughes v. Kearney*⁴ is another direct authority; Lord Redesdale laying down, as a very clear rule, that in all cases the vendor has the lien, and that it lies upon the purchaser to show a special agreement excluding it; that case being decided upon that ground. It cannot be admitted, certainly, against a purchaser for a valuable consideration without notice; but this defendant has not that character, having merely an equitable agreement for a security, not performed, when Martindale became a bankrupt, the plaintiff giving notice to the assignees, and the decree, obtained by the defendant Symmons, for a mortgage to him, expressing, that it was without prejudice to the claim of this plaintiff. Certainly, a former debt is sufficient to sustain a purchase as for a valuable consideration; but it is necessary that a party taking a conveyance for such a consideration should not have had notice of the claim when he took the conveyance. There are but two periods to which the point of notice can apply: first, the time when the consideration was advanced; secondly, when the conveyance was executed; and, even where a consideration has actually passed, it is necessary to state, in pleading, that there was no notice at either period, otherwise the purchaser cannot protect himself; *Wigg v. Wigg*.⁵ In this case it is essential that there should not have been notice at the latter period, before which notice is clearly established. The estate

¹ 1 Vern. 267.

² 6 Ves. 752.

³ 6 Ves. 475; see 483.

⁴ 1 S. & L. 132.

⁵ 1 Atk. 382.

was never properly out of the hands of the plaintiff. He had not taken a [*238] security carved out by himself, which might *preclude the equitable lien he once had, which therefore still remains. From the nature of this transaction, the consideration being a former debt, no money actually passing, no such hardship can arise from enforcing the lien, as in the case of a purchaser for valuable consideration actually paid in that transaction, who is affected by notice.

If, however, this defendant is to be considered as a purchaser for valuable consideration without notice, so that the lien cannot prevail against him, the plaintiff is entitled to consider him as only a mortgagee, having contracted with Martindale, as against whom the lien is good, for a mortgage. This plaintiff, therefore, cannot be affected by the decree for a foreclosure obtained by this defendant, who, having notice of the plaintiff's claim, did not make him a party.

Mr. *Richards*, Mr. *Alexander*, and Mr. *William Agar*, for the defendant.—There is nothing in the circumstances of this case depriving this defendant of the protection due to a purchaser for valuable consideration without notice, his transaction with Martindale being perfectly fair; the vendor claiming a preference by way of lien for the purchase-money remaining unpaid, as an equitable charge, prior in time, though he took the security of Martindale to that extent. Under such circumstances the lien has never been established; nor can the inference necessary to maintain it, be collected, either upon principle or authority. The general case of lien, as between vendor and vendee, is admitted, where there is no special agreement, no security taken in respect of the purchase-money; but this equity has not been carried beyond that simple case of vendor and vendee. In the case of *Chapman v. Tanner*,¹ there was a special agreement: the title-deeds were kept by the vendor, a deposit of the title-deeds of itself amounting to an equitable charge. Other cases, besides those which have been mentioned, in which this point arose, either directly or incidentally, are *Bond v. Kent*²—the case of a mortgage of the purchased estate for part of the money, and a note for the remainder; *Pollexfen v. Moore*³—a *very perplexed case, often cited; *Fawell v. Heelis*;⁴ [*239] *Blackburn v. Gregson*⁵—which is merely the opinion of Lord Loughborough, who desired to have the point further considered; *Trimmer v. Bayne*.⁶ The result of all of them is, that, where a security is given, there is no place for this equity, the purchaser certainly having to show that it does not exist. Here, a bond was given by Martindale; the security stipulated between the parties; and, therefore, the lien, substituted by equity, where there is no stipulation for a particular security, cannot be raised.

Sir *Samuel Romilly*, in reply.—The plaintiff being called upon, and obliged to pay the debt, against which Martindale undertook to indemnify him, that undertaking forming the consideration of Martindale's purchase, he cannot, upon the ground of fraud, be permitted to retain the estate. The lien, there-

¹ 1 Vern. 267.² 2 Vern. 281.³ 3 Atk. 272.⁴ Amb. 724; 1 Bro. C. C. 422, 3rd edit. n.; 2 Dick. 485.⁵ 1 Bro. C. C. 420.⁶ 9 Ves. 209.

fore, is clear in respect of the £10,500. The distinction as to the annuities rests upon the single circumstance, that a security by a bond of indemnity was taken, which is confined to the annuities. If this plaintiff had filed a bill against Martindale while in possession, he would have been compelled to pay the annuitants out of the purchased estate, and a receiver would have been appointed. No stronger instance of bad faith, no act more unconscientious, can be stated, than taking an estate in consideration of making payments, and, by a direct violation of the contract, permitting those payments to fall upon the vendor.

As to this defendant, if, from the passage, appearing in the report of *Poltexfen v. Moore*, it is supposed that the lien cannot be extended to a purchaser from the original vendee, it would be perfectly ineffectual; but that proposition is contradicted by many authorities. In *Walker v. Preswick*¹ it is distinctly laid down, that the lien prevails against a purchaser with notice. Upon what principle can such a distinction between this and any other equity be maintained? The point is expressly decided in the same way in *Gibbons v. Baddall*,² viz., if A. sells an estate, taking a promissory note for part of the purchase-money, and then the purchaser sells to B., who has *notice [*240] that A. had not received all the money, the land is in equity chargeable with the money due on the note. The defendant cannot be represented as a purchaser without notice, merely as not having notice when he advanced his money. It is true, not then having this estate in contemplation, he could not have notice at that time; but, to sustain a purchase as for valuable consideration without notice, it is essential that there should not have been notice either when the money was advanced, or when the conveyance was executed. That doctrine has been always held from the earliest period, in *More v. Mayhow*,³ to the time of Lord Hardwicke, in *Wigg v. Wigg*;⁴ and the reason is, that some suspicion arises from not taking the legal estate, when the money is advanced. The defendant, having the means, by acquiring the legal estate, of placing himself in a situation in which the want of notice would avail, merely took an agreement; and, having only an equitable title, cannot maintain the plea of purchaser for valuable consideration without notice. The doctrine that certainly prevails between mortgagees, that, the equities being equal, a subsequent mortgagee, having got in the legal estate, may exclude a prior incumbrance, applies only where the money was advanced upon the credit of the estate; not where the estate was not in contemplation, and other securities were looked to, which is the case of this defendant, when he advanced his money; and upon that ground a judgment creditor, taking in a prior mortgage, cannot tack.⁵

[The Lord Chancellor, (Eldon.)—With regard to the doctrine to which you are now alluding, is there any case where a third mortgagee has excluded the second, if the first mortgagee, when he conveyed to the third, knew of the

¹ 2 Ves. 622.

² 2 Eq. Ca. Abr. 682, n.

³ 1 Ch. Ca. 34.

⁴ 1 Atk. 382; *Tourville v. Naish*, 3 P. Wms. 307, where the notice was before payment of the money.

⁵ *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

second? When the case of *Maundrell v. Maundrell*¹ was before me, I looked for, but could not find, such a case—that, where there was bad faith on the part of the first mortgagee, that equity was applied.²]

Sir *Samuel Romilly*, in reply.—I do not believe that was ever decided; and there would be great difficulty of deciding it in favor of the third mortgagee, who puts *himself in the place of the first. The result of the [*241] authorities, and of the circumstances to which they are to be applied, is, that a part of the money, which was the consideration of the original purchase, remaining unpaid, the Court will raise the lien, and will enforce it against a second purchaser with notice; that universally the time of the conveyance, as well as the time of the advance, is material with regard to notice; and that this defendant clearly had notice before the conveyance.

LORD CHANCELLOR ELDON:—Upon the special circumstances of this case I shall postpone my judgment; I should be very unwilling to leave some of the doctrine, that has been brought into controversy, with as much doubt upon it, as would be the consequence of deferring the judgment without taking some notice of it.

The settled doctrine, notwithstanding the case of *Fawell v. Heelis*,³ is, that unless there are circumstances such as we have been reasoning upon, *where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid.* I take that to have been the settled doctrine at the time of the decision of *Blackburn v. Gregson*,⁴ which case so far shook the authority of *Fawell v. Heelis* as to relieve me from any apprehension, that Lord Bathurst's doctrine can be considered as affording the rule to be applied as between the vendor and vendee themselves, and persons claiming under them.

There is a case, *Smith v. Hibbard*,⁵ reported nowhere but in *Dickens*, which seems to decide this point. There is also another case, besides those which [*242] have been mentioned, *showing the opinion of Lord Hardwicke, that the lien prevails: *Harrison v. Southcote*,⁶ the case of a Papist vendor, for whom, Lord Hardwicke says, the lien would not be raised, as that would be giving an interest in land to a Papist; the specialty of that proving, that the lien prevails in general cases. In the case of *Elliot v. Edwards*,⁷ Lord

¹ 10 Ves. 246.

² See *Peacock v. Burt, Coote, Mortg.* 693, where a third mortgagee without notice, taking a transfer from the first mortgagee who had notice of the second, was not affected by it.

³ Amb. 724; 1 Bro. C. C. 422, n., 3rd edit.; 2 Dick. 485.

⁴ 1 Bro. C. C. 420.

⁵ 2 Dick. 730.

⁶ 2 Ves. 389; see 393.

⁷ 3 B. & P. 181; see 183.

Alvanley was very strong upon it. There was a covenant for payment of the money upon the first purchase, and also an undertaking by a surety—strong circumstances to show, that, as between the vendor and vendee, there is no intention to rely upon the lien. The point was not decided in that case; but Lord Alvanley lays down the doctrine as I have stated it, that even in the hands of another person, with notice, the lien remains. In *Gibbons v. Bad-dall*,¹ the lien was held to be clear against a second purchaser, with notice. There is a very old case in *Cary*,² which I have heard cited as one of this class; but I have some doubt whether it is not a case of equitable interposition upon another ground. The circumstance leading me to that doubt is, that there was a lost bond; and the modern doctrine of dispensing with profer³ was not at that time known. The Lord Chancellor might, therefore, consider himself as having jurisdiction in that case to direct payment of the money due upon that bond out of the estate. In *Austen v. Halsey*,⁴ what I stated upon this subject was not said without much consideration. I had not at that time, nor have I now, the least doubt that it is the doctrine.

I have some doubt upon another point: taking the vendor to have the lien, whether the Court will, in case of the death of the vendee, marshal the assets, so as to throw the lien upon the purchased estate. It has often been said, and the case of *Coppin v. Coppin*⁵ stated as an authority, that the Court will not do that. The Lord Chancellor, in his judgment, takes no notice of that point. In that case the vendor happened to be the heir of the vendee, so that the estate was at home; and it was held, that, being also the executor, he was entitled to retain the purchase-money out of the personal assets. That *decision requires a good deal of consideration. If the estate had [*243] been in a third person, the general doctrine, as to a person having two funds to resort to, might be thought to have an immediate application; and the express terms of the decree in *Pollexfen v. Moore*⁶ might be found very inconsistent with it.

It is not, however, necessary to decide that point; as this is an equity, that in ordinary cases will affect a purchaser. Upon principle, without authority, I cannot doubt that it goes upon this, that *a person having got the estate of another, shall not, as between them, keep it, and not pay the consideration; and there is no doubt that a third person, having full knowledge, that the other got the estate without payment, cannot maintain, that though a court of equity will not permit him to keep it, he may give it to another person without payment.* It is not, however, necessary to discuss that upon general principles, as it has been repeatedly stated by authorities that ought, at this time, to bind upon that point.

Another principle, as matter of general law, is involved in this case: what

¹ 2 Eq. Ca. Abr. 682, n.

² *Hearle v. Botelers*, *Cary*, 35.

³ Profer dispensed with, where a bond is lost; see 5 Ves. 238, n., 2d edit.

⁴ 6 Ves. 475.

⁵ 2 P. Wms. 291; Sel. Ca. Ch. 28. See, however, *Trimmer v. Bayne*, 9 Ves. 209; *Sproule v. Prior*, 8 Sim. 189; *Selby v. Selby*, 4 Russ. 336; *Wythe v. Henniker*, 2 My. & K. 635.

⁶ 3 Atk. 272.

shall be sufficient to make a case in which the lien can be said not to exist. It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist. Lord Bathurst seems to have thought a note would put an end to it. Other judges, of very high authority, dissented from that; as appears by the cases of *Gibbons v. Baddall*¹ and *Hughes v. Kearney*.² It does not necessarily follow from a written contract, giving another remedy, that the lien was intended not to exist. It is very difficult, then, to distinguish the case where a note or bond is given for part of the money. In the case of *Bond v. Kent*,³ where the estate sold was mortgaged for part of the [*244] money, and a note taken for the rest, there was strong *negative evidence, that the vendor was not intended to be a mortgagee for the rest. The case put by the Master of the Rolls, in *Nairn v. Prowse*,⁴ of a mortgage upon another estate, also afforded strong, perhaps not quite conclusive, evidence against the lien, considering the value of the mortgaged estate—in general, much more than the amount of the money. It does not, however, appear to me a violent conclusion, as between vendor and vendee, that, notwithstanding a mortgage, the lien should subsist. The principle has been carried this length: *that the lien exists, unless an intention, and a manifest intention, that it shall not exist appears.*

This case remains to be considered upon its own circumstances with reference to the points I have stated. The questions are, first, supposing the lien would have existed as to the gross sum, the debt to Manners and the annuities, or their value, whether the circumstances of silence as to the debt, and the indemnity taken against the annuities, which is very important, amount in equity to evidence of a manifest intention to abandon the lien: if they do, another very considerable point is, whether, the lien having been abandoned, the plaintiff can set himself up as a mortgagee, claiming to redeem the defendant. If the lien is to be considered as not abandoned, the question will be, not whether a purchaser, with notice, would be affected by the lien—which, as general doctrine, I admit,—but whether, under the circumstances attending the contract with, and conveyance to, this defendant, it shall prevail against him. Upon the particular circumstances, the case must stand for judgment.

⁵LORD CHANCELLOR ELDON, having stated the case very particularly, and observing that the legal estate in the premises was, before the assignees of Martindale executed the agreement for a mortgage to Symmons, vested; under a former conveyance by Mackreth, in a trustee to secure annuities granted by him, pronounced the following judgment:—

[*245] This case, when it was argued, and since, has appeared *to me to involve a question of very great importance, with regard to which I

¹ 2 Eq. Ca. Abr. 682, n.

² 1 S. & L. 132.

³ 2 Vern. 281.

⁴ 6 Ves. 752; see 760.

⁵ Nov. 26th, 1808.

am not able to find any rule which is satisfactory to my mind. If I had found, laid down in distinct and inflexible terms, that, where the vendor of an estate takes a security for the consideration, he has no lien that would be satisfactory; as, when a rule, so plain, is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If, on the other hand, a rule has prevailed, as it seems to be, that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence, as it is sometimes called, or to declaration plain, or manifest intention, the expressions used upon other occasions, of a purpose to rely, not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a vendor, taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point. That observation is justified by a review of the authorities: from which it is clear that different judges would have determined the same case differently; and, if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right.

This bill insists upon a lien in respect of these annuities; to be paid all that the plaintiff himself has paid; and either as to the original value, or the present value, or the future payments. I state that claim in these different terms, as, to determine what is the lien, it is necessary to point out the amount of it, and how it is to be calculated. Some doubt was thrown in the argument upon the question of lien between the vendor and vendee; but it was not carried far; and it is too late to raise a doubt upon it: but it is insisted, that the lien does not prevail against third persons, even with notice of the situation of the vendor and vendee. It may be of use to state the cases upon this subject in the order of time.

*The earliest case, not very applicable, is in *Cary*,¹ and most of the Abridgments, which imperfectly collect the authorities upon this [*246] head. According to my own understanding, that case is to be classed rather among those of relief in equity upon a security that has been lost,² than under this head; but the fact of its existence is a circumstance of evidence that this doctrine has obtained in professional practice. There is no other case between that and *Chapman v. Tanner*,³ which is very imperfectly reported; and its authority is weakened by the observation in subsequent cases, that there was a special agreement that the vendor should keep the writings; and it is stated as a fact, that he had not taken any security. Taking it to be a decision in favor of the lien under those circumstances, the declaration of the Court, which was the natural equity, shows strongly how the law upon this subject was understood; and that case, therefore, has considerable weight. The doctrine is probably derived from the civil law as to goods, which goes further than our law; by which, though the right of stoppage in transitu is founded upon natural justice and equity, yet if possession, either actual or constructive,

¹ *Hearle v. Botelers*, *Cary*, 35.

² See 5 *Ves.* 238, n.

³ 1 *Vern.* 267.

was taken by the vendee, the lien is gone. That is not so by the civil law. The Digest states:¹ "Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione;" which points at this article of security; but, with those excepted cases, the lien, according to the civil law, is so strong, that the goods may be taken out of the possession of the individual who had obtained actual or constructive possession of them.

The next case is *Bond v. Kent*,² the circumstances of which are special—a mortgage for part of the money, and a note for the residue. It was urged with considerable, perhaps not conclusive, weight, that the express charge of a part gave a ground for the inference, that a lien for the residue was not intended. The case, however, goes to prove, that, in equity, this lien was [*247] supposed to exist; *amounting to an admission, that without those special circumstances, there would have been a lien.

The next case is *Coppin v. Coppin*,³ where the doctrine of *Pollexfen v. Moore*,⁴ as to marshalling, was practically, though I doubt whether it ought to have been, admitted. I should mention *Gibbons v. Baddall*,⁵ where it is expressly stated, that the lien remained, though a note was given for a part of the purchase-money; but I cannot ascertain the date of that decision. In *Pollexfen v. Moore*, Lord Hardwicke affirms the lien of the vendor upon the estate for the remainder of the purchase-money, considering the vendee from the time of the agreement a trustee as to the money for the vendor; but adds, that "this equity will not extend to a third person."

If that is to be understood, that this equity would not extend to a third person, who had notice that the money was not paid, Lord Hardwicke's subsequent decisions contradict that: if the meaning is, that he would follow the case of *Coppin v. Coppin*, and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets as he pleases, having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors, who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case is anomalous.

The next case in which the doctrine was admitted is *Harrison v. Southcote*,⁶ followed by *Walker v. Preswick*;⁷ which case, it is remarkable, was not cited in *Fawell v. Heelis*:⁸ and in *Burgess v. Wheate*,⁹ Sir Thomas Clarke lays down the rule, both as to vendor and vendee, thus:—"Where conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser." *Tardiffe v.*

¹ Dig., lib. 18, tit. 1, l. 11.

² 2 Vern. 281.

³ 2 P. Wms. 291.

⁴ 3 Atk. 272.

⁵ 2 Eq. Ca. Abr. 682, n.

⁶ 2 Ves. 389; see 393.

⁷ 2 Ves. 622.

⁸ Amb. 724; 1 Bro. C. C. 422, n., 3d edit.; 2 Dick. 485.

⁹ 1 Black. 123; see 150.

**Scrughan*¹ is very material upon this point, as it is represented² as a [*248] case in which the lien was held to attach upon the two moieties of the estate; but it has been also considered³ a case, whether of lien upon the land or not, for contribution upon the circumstances between the sisters; giving the one sister a right to call upon the husband of the other to pay a moiety of the annuity. In another case, also, *Powell v. —*, whether accurate or not I cannot trace, Lord Camden determined in favor of the lien.

In *Fawell v. Heelis*,⁴ Lord Bathurst's opinion certainly was, for reasons best stated in the case of *Nairn v. Prowse*⁵ by Sir Samuel Romilly, that the bonds taken by the vendor furnished evidence, that credit was not given to the land; and, therefore, there was no lien. In *Beckett v. Cordley*,⁶ Lord Thurlow says, it was compared to a person selling an estate, and not receiving the money; and, therefore there is a lien; asserting the general doctrine as familiar, but distinguishing that case upon the nature of the transaction; younger children joining the eldest in a mortgage; discharging the estate from their portions; and by their consent the whole money being paid to the eldest son: the lien being discharged by that transaction.

In the argument of *Blackburn v. Gregson*,⁷ Lord Kenyon took the doctrine to be perfectly clear; and it is not possible to state a stronger judicial opinion than Lord Loughborough expressed, that the lien does exist, though it is not a decision. In *Smith v. Hibbard*,⁸ it was insisted that the delivery of possession, upon payment of a small part of the money, was evidence that he meant to trust to the personal security; but it was held clear, that the money contracted to be paid was a specific lien upon the premises. The contract for payment of the money is itself, in a sense, a security full as good as a note. I do not state, as an authority, what appears upon this subject in *Austen v. Halsey*,⁹ as it is a mere dictum, and a dictum that fell from me; but, endeavoring to state this doctrine as accurately as I could, I see I expressed it in these *words:¹⁰ "That the vendor has a lien for the purchase-money, while [*249] the estate is in the hands of the vendee. I except the case where upon the contract evidently that lien by implication was not intended to be reserved."

In the case of *Elliott v. Edwards*,¹¹ this is the doctrine of Lord Alvanley, a very experienced judge in equity, with reference to whom I may say, his judgments will be read and valued as producing great information and instruction to those who may practise in courts of equity in future times. He there states, that, if a man, having purchased an estate, conveys it before the purchase-money has been paid, a court of equity will compel the person to whom the estate was conveyed to pay that money, provided he knew at the time he took the conveyance that it had not been paid.

The next case in equity is *Nairn v. Prowse*,¹² before the Master of the

¹ Cited Amb. 725; 1 Bro. C. C. 423.

² 1 Bro. C. C. 423, in *Blackburn v. Gregson*.

³ Amb. 726, in *Fawell v. Heelis*.

⁴ Amb. 724; 1 Bro. C. C. 422, n., 3rd edit.; 2 Dick. 485.

⁵ 6 Ves. 752.

⁶ 1 Bro. C. C. 353; see 358.

⁷ 1 Bro. C. C. 420.

⁸ 2 Dick. 730.

⁹ 6 Ves. 475.

¹⁰ 6 Ves. 483.

¹¹ 3 B. & P. 181; see 183.

¹² 6 Ves. 752.

Rolls, in which it was contended that there was no lien ; the vendor had taken a security for the money, payable at a future time, and during the interval the vendee might have sold the stock. The Master of the Rolls, in his judgment, admitting the general doctrine as to the vendor's lien, observes upon the question, whether a security taken will be a waiver, that by conveying the estate without payment a degree of credit is given to the vendee, which may be given upon the confidence of the existence of such lien ; and it may be argued, that taking a note or a bond cannot materially vary the case ; a credit is still given to him, and may be given from the same motive, not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt endorsed upon the conveyance. There is great difficulty to conceive how it should have been reasoned, almost in any case, that the circumstance of taking a security was evidence that the lien was given up, as in most cases there is a contract under seal for payment of the money. The Master of the Rolls, having before observed that there may be a security, which will have the effect of a waiver, proceeds to express his [*250] *opinion, that, if the security be totally distinct and independent, it will then become a case of substitution for the lien, instead of a credit given on account of the lien ; meaning, that not a security, but the nature of the security, may amount to satisfactory evidence that a lien was not intended to be reserved, and puts the case of a mortgage of another estate, or any other pledge, as evidence of any intention that the estate sold shall remain free and unincumbered. It must not, however, be understood that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended, as I could put many instances that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien, though, in the ordinary case, a man has always greater security for his money upon a mortgage than value for his money upon a purchase ; and the question must be whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien which he has ? Under all the circumstances of that case the judgment of the Master of the Rolls was satisfied, that the conclusion did follow ; but the doctrine as to taking a mortgage, or a pledge, would be carried too far if it is understood, as applicable to all cases, that a man taking one pledge therefore necessarily gives up another ; which must, I think, be laid down upon the circumstances of each case, rather than universally. In the case of *Hughes v. Kearney*¹ Lord Redesdale states the doctrine ; and the proposition is, not merely that the vendor might have security, but that he relied upon it ; and a note or bills are considered not as a security, but as a mode of payment.

From all these authorities the inference is, *first, that, generally speaking, there is such a lien ; secondly, that in those general cases in which there would*

¹ 1 S. & L. 132.

*be the lien, as *between vendor and vendee, the vendor will have the lien against a third person, who had notice that the money was not paid.* Those two points seem to be clearly settled. I do not hesitate to say, that, if I had found no authority that the lien would attach upon a third person, having notice, I should have had no difficulty in deciding that upon principle, as I cannot perceive the difference between this species of lien and other equities, by which third persons, having notice, are bound. In the case of a conveyance to B., the money being paid by A., B. is a trustee; and C. taking from him, and having notice of the payment by A., would also be a trustee, and many other instances may be put. [*251]

The more modern authorities upon this subject have brought it to this inconvenient state—that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken.

In this case, having, as other judges have had, to determine this question of intention upon circumstances, I may mistake the fair result of the circumstances which I have endeavored to collect. I must say, I have felt from the first, that there is, upon the part of the plaintiff, that natural justice and equity, which excite a wish, that I could enforce the lien throughout; but, first, as to the annuities, I am persuaded, that with reference to that part of the case involving the question of lien as to the consideration, or any part of it, or any sum of money, the quantum of which is to be estimated with reference to the present value, or the past or future payments, this is a case in which the plaintiff intended to rely entirely upon the personal security, the bond for £20,000; and that was the conception of Martindale also; by whose default of payment, therefore, the estate is not now subject to the lien in respect of the consideration of the annuities, or any allowance in respect of it. See how it *stands. In 1790, the plaintiff, as principal, and Martindale, [*252] as surety, being engaged in an obligation, which I understand to be a personal one, for these annuities, agree to change situations; Martindale to be the principal, and the plaintiff to be surety; in consideration of which the plaintiff agrees to give £9000, secured by a mortgage. It rests upon that until 1793, when the transaction takes this course; that Martindale shall be no longer a mortgagee, but owner of the reversion in fee, and, which is material, of the reversion, expectant upon the plaintiff's life estate. The annuities remain upon the old footing; that is, some payments were made, or arrears accrued, between 1792 and 1793, and payments were to arise from time to time. The value given to Martindale, in 1792, by the mortgage of £9000, for taking the liability upon himself, was a value which merely, by the lapse of time, between 1792 and 1793, must have varied. If the annuities had been paid, there must have been a difference in the estimation; also, de anno in annum, the value was decreasing, not only as the annuities were wearing out, but also as the number of the annuitants was decreasing by death. It is impossible, it is not natural, to suppose, that parties dealing for

the consideration of annuities and the purchase of a reversion, which might not take effect in possession until all the annuitants were dead, relied on that reversion as security, in addition to the indemnity by the bond for £20,000; in the original transaction the estate being pledged for the sum of £9000, as if actually paid.

Then, as to the lien, for what is it? Is it for the original sum? That it cannot in justice be. Is it for future payments—that, one sum being paid, it does not attach? another sum not being paid, it does attach? a charge upon the reversion arising from time to time, accordingly as these payments are, or are not, made? And is that inference to be drawn where a conveyance was executed without the least notice of such an intention—a security taken, not of itself sufficient to exclude the purpose of such a lien? but the [*253] nature of the subject, connected *with the fact of that security taken, is decisive proof against such an intention; and it appears accordingly in the other cause, *Symmons v. Rankin*, that Mackreth and Martindale joined in the conveyance to Coutts, to secure an annuity of £2000, without the least reference to such an intention.

I admit, that the opinion of Lord Loughborough,¹ that the case, before Lord Camden,² went upon the ground of lien, is an authority very considerably against my opinion; and I cannot say upon what the case did proceed, if not upon that ground; as the estate, given by the wife to her husband for his life, after her own death, if not affected by the lien, could not be bound to pay the annuity. If that case is accurately represented Lord Camden's opinion seems to have been, that the mere circumstance of an estate given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time; and, so understanding it, I cannot bring my mind to the conclusion that it is an authority which ought to lead me to determine, that, with reference to these annuities, there is a lien, either for the original value, the present value, or the future payment, which may or may not become due.

As to the other part of the case, I have considered long, whether the conclusion is just, that, not meaning to have a lien, as I think this party did not, with regard to the annuities, he should mean to have a lien as to the sum of money due to Manners. My individual opinion is, that the intention was the same as to both; but, with regard to the latter, the cases authorize the lien; unless it is destroyed by particular circumstances, which do not exist here. That sum is precisely in the condition of a part of the consideration, not paid; and then the inference in equity, unless there are strong circumstances, getting over it, is, that a lien was intended. This comes very near the doctrine of Sir Thomas Clarke,³ which is very sensible; that, where the conveyance, or the payment, has been made by surprise, there shall be a lien. This plaintiff [*254] understood at the time of the conveyance, *that this money was to be paid on his account to Manners; which is the same as if it was to have been paid to himself, and was not paid; and then the only question is, whether,

¹ See *Blackburn v. Gregson*, 1 Bro. C. C. 420.

² *Tardiffe v. Scrughan*, stated 1 Bro. C. C. 423.

³ *Burgess v. Wheate*, 1 Black. 150.

as, from the special circumstances as to the value and nature of the annuities, I am to infer that a lien was not intended as to them, I must make the same inference with respect to this gross sum; as to which, if the annuities were not mixed with the transaction, the doctrine of equity is, that the lien would attach. As to that sum, my judgment is, that the plaintiff has a lien.

It is contended, that there are other circumstances in this case; that the defendant, Symmons, has a conveyance of the estate without notice; or, rather, a contract; as he had notice at the time of the conveyance. It is not necessary to go into the doctrine as to the effect of notice at the time of the contract, or at the time of payment of the money; though there is no doubt the defendant, when he took his conveyance, had notice from the recitals in his title-deed of Mackreth's rights and Martindale's obligations, as vendor and vendee. Neither is it necessary to go into the consideration of another argument; that the defendant's money was not originally lent upon the faith of the land. There is a great difference between the effect of a judgment, as attaching upon the land, and a special agreement by a creditor for a security upon the land. It is not, however, necessary to determine such questions; as neither the plaintiff nor the defendant, Symmons, has the legal estate, which appears in the other cause, *Symmons v. Rankin*, to be in Coutts, under the conveyance of 1793, in which Martindale and Mackreth joined; and then, between equities, the rule "Qui prior est tempore potior est jure," applies.

The result of this case is, that the bill must be dismissed as it regards the annuities, and is right as to the other part of the claim; and, being right in one point, and wrong in the other, the decree must be without costs.

*This case was mentioned by way of motion to vary the minutes, [*255] upon a misunderstanding as to the costs.

LORD CHANCELLOR ELDON, having repeated the ground upon which no costs were given, made the following additional observations:—

Since the judgment was pronounced, I have met with a case which was not cited in the argument, but is referred to in Mr. Sugden's work,¹ which seems to me to be a book of considerable merit,² in which this subject is considered with much attention, and he comes to a conclusion different from mine. I looked into the Register's Book for that case, the name of which I do not recollect; and it does seem to me that his inference is not the necessary inference, arising from the circumstances of that case, as I find it in the Register's Book. I mention this, to show that I have not withdrawn from the opinion I have expressed upon this subject; as to which, conceiving it to be of great importance, I should, if convinced, be very ready to retract; but, having

¹ The case alluded to by the Lord Chancellor appears to be *Comer v. Walkley*, stated 356, 2nd edit.; 465, 866, 11th edit., Sudg. V. & P.

² The work on Vendors and Purchasers, the 13th edition of which appeared this year, (1857.)

endeavored to collect all the doctrine of the Court upon it, I am sure I am right in that. I wish I was as sure in the application of the evidence.

In the important and leading case of *Mackreth v. Symmons*, Lord Eldon, in his elaborate and learned judgment, very fully examines the authorities upon the doctrine of the vendor's equitable lien for unpaid purchase-money. The doctrine itself, which at the present day is seldom, if ever, brought into dispute, is thus stated by Lord Eldon in the principal case:—"Where," observes his Lordship, "the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid, as between the vendor and the vendee, and persons claiming as volunteers, upon the doctrine of this Court, which, when it is settled, has the effect of a contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case, for the whole consideration; in the other, for that part of the money which was not paid. See also, *Chapman v. Tanner*, 1 Vern. 267; *Austen v. Halsey*, 6 Ves. 475.

[*256] *The lien also attaches if possession of the estate has been delivered to the purchaser, although there has been no conveyance of it to him, (*Smith v. Hibbard*, 2 Dick. 730; *Charles v. Andrews*, 9 Mod. 153; *Topham v. Constantine*, Tam. 135; *Evans v. Tweedy*, 1 Beav. 55;) and upon copyholds and leaseholds, as well as freeholds: (*Winter v. Lord Anson*, 3 Russ. 492; *Matthew v. Bowler*, 6 Hare, 110.)

When, however, the vendor has taken from the purchaser a security for the unpaid purchase-money, the question arises, whether that amounts to an abandonment of the lien; for its existence must be decided, not as a dry question of fact, whether a security was taken, for the mere taking of a security is not a waiver of the lien, but it depends upon the circumstance of each case, whether the Court is to infer, that the lien *was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the security was taken.*

The inconvenience of such a doctrine, so unsatisfactory and productive of litigation, may well have caused Lord Eldon to observe, in the principal case, "that it would have been better at once to have held, that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what cases it would not, exist.

It is now settled, that a mere personal security for the purchase-money, as a bond, (*Hearle v. Botelers*, Cary, 35, and *Winter v. Anson*, 3 Russ. 488, reversing the decision of Sir J. Leach, V. C., 1 S. & S. 434,) a bill of exchange, (*Hughes v. Kearney*, 1 S. & L. 136; *Teed v. Carruthers*, 2 Y. & C. C. C. 31; *Grant v. Mills*, 2 V. & B. 306,) or a promissory note, (*Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682, n.; *Hughes v. Kearney*, 1 S. & L. 132; *Ex parte Peake*, 1 Madd. 346; *Ex parte Loaring*, 2 Rose, 79,) will not, without more, be

sufficient evidence of the intention of the vendor to give credit exclusively to the purchaser, or to his security, so as to take away the lien.

In *Winter v. Lord Anson*, 1 S. & S. 434, there was an agreement for the sale of an estate, by which it was, amongst other things, agreed that the amount of the consideration-money should be secured by the bond of the purchaser to the vendor, with interest at 4l. per cent., and should remain so secured, *during the life of the vendor*, on the regular payment of interest. A conveyance was executed, *in pursuance of the agreement, and in consideration of the purchase-money therein expressed to have been paid*, and the vendor's *receipt was indorsed upon it. Part only of the purchase-money [*257] had, in fact, been paid, and the residue was secured by bond conditioned to be void on payment by the vendee, to the executors, administrators, or assigns of the vendor, of the residue of the purchase-money within twelve months next after the decease of the vendor, with interest at £4 per cent. Sir J. Leach, M. R., although he at first decided in favor of the lien, afterwards decided against it, upon the ground that the case was, in principle, the same as if the conveyance had stated the real contract of the parties; and that, by the effect of that contract, the vendor agreed to part with his estate *in consideration of the bond for the future payment of the price*; and that, when such bond was executed, the estate passed to the vendee in equity, as well as at law. "Suppose," observed his Honor, "it had been expressed in this conveyance, that the price was not to be paid until the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the meantime; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case, that the vendor had contracted to part with his estate presently, and not in consideration of the actual immediate payment of the price, but *in consideration of the covenant for the future payment of that sum*, with interim interest; and that having, therefore, the covenant, which was the consideration bargained for, the estate must pass by the conveyance in equity, as well as at law?" This decision was reversed by Lord Lyndhurst, who held, that the circumstance, that the money was secured to be paid at a future day, did not affect the lien. "I do not think," said his Lordship, "that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge; and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity:" 3 Russ. 488. An appeal was lodged in the House of Lords against this decision, but it was afterwards withdrawn: Sugd. V. & P. 258, 11th edit.

Where an estate is conveyed, in consideration of an annuity, the vendor

[*258] will have a lien upon the land for the annuity, although a *bond or covenant is given to secure the payment of the annuity. See *Tardiffe v. Scrugan*, 1 Bro. C. C. 423, where Lord Camden's opinion seems to have been, that the mere circumstance of an estate being given in consideration of an annuity, with a bond, would not prevent the lien attaching from time to time: *Blackburn v. Gregson*, 1 Bro. C. C. 420. In *Clarke v. Royle*, 3 Sim. 502, Sir L. Shadwell, V. C., is reported to have said, that it appeared to him that Lord Eldon, in *Mackreth v. Symmons*, had expressly overruled the decision of Lord Camden in *Tardiffe v. Scrugan*. However, in *Buckland v. Pocknell*, 13 Sim. 412, his Honor, in allusion to what he was reported to have said in *Clarke v. Royle*, observes: "I think that, if that were said in those very terms, it was said too strongly; because it cannot be said that my Lord Eldon did overrule *Tardiffe v. Scrugan*; although I think that it may be fairly inferred from the remarks that he made upon that case, in his judgment in *Mackreth v. Symmons*, that he was not satisfied with the decision in all its parts. He shows, as it strikes me, an inclination to criticise it, and to escape from it, if the circumstances of the case before him would allow him to do so. But I do not wish it to be understood to be my opinion, that he overruled it point blank." In the case of *Matthew v. Bowler*, 6 Hare, 110, where there was a sale and assignment of a life interest in leaseholds in consideration of a weekly sum, to be paid to the vendor during her life, with a covenant by the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease; it was held, by Sir James Wigram, V. C., that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment for the weekly payment. His Honor said, "That, if the case of *Tardiffe v. Scrugan* was not approved, it certainly was not overruled by Lord Eldon. The case had been much considered by Sir Edward Sugden; and it was clear that his opinion was, that the lien in such a case ought to be sustained. He should be most reluctant to come to a different conclusion. He was of opinion, in this case, that the plaintiff was entitled to the lien claimed by her bill. The purpose of the covenants in the deed to uphold the property could scarcely be understood, unless the property was intended to constitute a security."

Upon examining carefully that branch of the principal case which relates to the lien claimed for the annuities, it will be found, notwithstanding the ambiguity of Lord Eldon's language, that it may be reconciled with *Tardiffe* [*259] *v. Scrugan* and *Matthew v. Bowler*; for Lord Eldon did not, as a bare abstract point of law, decide that there is no lien where an estate is sold in consideration of an annuity secured by a bond or covenant; but he considered that the special circumstances of the case showed that the vendor intended to rely upon the personal security, viz., the bond for £20,000, and that such was the conception also of the vendee. The principle, therefore, upon which that branch of *Mackreth v. Symmons* was decided, is certainly correct; but it has been doubted by an eminent writer, whether the circumstances of the case were such as justified Lord Eldon in coming to the con-

clusion, that it was the intention of the vendor to rely upon the personal security, and thus discharge the lien for the annuities. See Sugd. V. & P. 869, 11th edit.

In *Clarke v. Royle*, 3 Sim. 499, the conveyance was made in *consideration of the vendee entering into covenants therein contained for payment of an annuity to the vendor, and 3000*l.* to certain persons in the event of the vendee's marrying*. Sir L. Shadwell, V. C., distinguishing the case from *Tardiffe v. Scrughan*, held, that there was no lien, on the ground that the deed plainly marked out, that the *consideration on the one side, was the conveyance of the estate, and, on the other, the entering into the covenants*. "Why," he asked, "am I to declare, that, in respect of this annuity, and of the sum which is payable on a contingency, and which, therefore, never may be payable, there is to be a lien on the purchased estates? Why should I go further than any of the cases that have been hitherto decided upon the subject of lien on purchased estates, and do that which appears to be contrary to the intention of the parties? I consider that this case is decided by the authority of *Winter v. Lord Anson*." It may be here remarked, that the Vice-Chancellor does not appear to have been aware that the decision of Sir J. Leach had been reversed by Lord Lyndhurst. However, it is presumed that *Clarke v. Royle* is still a binding authority, because there a case actually arose similar to that which Sir J. Leach assumed, though wrongly, to exist in *Winter v. Lord Anson*. In that case, the conveyance, though expressed to be made in pursuance of the agreement, (which, however, was to take a bond, and not a covenant,) did not otherwise refer to it, and was expressed to be made, not in consideration of the agreement, but *in consideration of a sum of money*. In *Clarke v. Royle*, the conveyance was *in consideration of certain covenants being entered into* by the purchaser; the covenants, therefore, plainly formed the consideration, and the lien was gone.

Upon the same principle it has *been held, that, where a receipt was given by the vendor for a bond, as the consideration for an estate, [260] the lien was gone; thus, in *Parrott v. Sweetland*, 3 My. & K. 655, a daughter conveyed her remainder in fee in an estate to her father, who was tenant for life, subject to a mortgage, in consideration of his entering into a covenant to indemnify her against the mortgage, and in consideration of 3000*l.* advanced, or agreed to be advanced or secured to her, in contemplation of her intended marriage, *upon the terms expressed in a bond bearing even date therewith*. On the indenture of release was endorsed a receipt signed by the daughter, as follows:—"Received, on the day and year first written, of and from the within-named J. P., a bond for the sum of 3000*l.*, being the full consideration within expressed to be given by him;" and the condition for making void the bond was, upon payment to his daughter and her intended husband of an annuity for their lives, and of 3000*l.* in certain events. Sir J. Leach, M. R., decided against the lien, observing that it was plain that it was not a case of a security, but a substitution for the price which the vendor had agreed to accept, and that the lien for the purchase-money was consequently discharged. This decision was affirmed by the Lords Commissioners, Sir L. Shadwell and Mr.

Justice Bosanquet. Sir L. Shadwell thought that, although the appeal had been argued as if it were a naked case of vendor and purchaser, it appeared to be a sort of family arrangement between a father, daughter, and her intended husband, utterly inconsistent with the notion of a payment of purchase-money; and that it was obvious that the parties did not treat the consideration as a mere sum of 3000*l.*; that the receipt was for the bond, and not for the 3000*l.*; and it appeared, therefore, that the parties were bargaining for a security, and not a stipulated sum, and consequently no lien arose, because the vendor had actually received the consideration.

So, likewise, in *Buckland v. Pocknell*, 13 Sim. 406, where A. agreed to sell an estate to B. for an annuity of 200*l.*, to be paid to him for his life, and an annuity of 92*l.*, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to A. and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in *consideration of the premises and of the annuities having been so granted as thereinbefore recited*, and of the payment of the mortgage-money, conveyed the *estate to B. Upon the death of A., his son's [*261] annuity, which had been assigned to the plaintiff, became in arrear. Sir. L. Shadwell, V. C., held that there was no lien for the annuity. "The question," observes his Honor, "is whether it does not appear, on the face of the deeds, that the party who contracted to sell the land has got *that which he contracted to have*. Adverting to the mode in which the conveyances are made, my opinion is, that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold, that, after the deeds were executed, any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities, and covenants for payment of them; and *as the conveyance was made expressly in consideration of that deed*; and as it was part of the express stipulation that the mortgage-money should be paid off, and, consequently, that the mortgagee should convey his legal estate to the purchaser, it would be quite inconsistent with the mode in which the parties have dealt, to say that there is still an ulterior latent equity, for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it. In the case of *Parrott v. Sweetland*, which came before me and Mr. Justice Bosanquet, when we had the honor of being Commissioners of the Great Seal, we affirmed the judgment of Sir J. Leach, in a case where the course of the transaction showed that the party had got that for which he bargained."

So, likewise, in *Dixon v. Gayfere*, (17 Beav. 421; 21 Beav. 118,) where the purchaser contracted to buy an estate from the vendor, and upon an assignment being made to grant to the vendor an annuity of 50*l.* per annum, during three lives, "*to be secured by bond*," Sir John Romilly, M. R., held, that the vendor had no lien on the estate for payment of the annuity.

"The case of *Buckland v. Pocknell*," said his Honor, "appears to me to be very near the present. . . . It appears to me the mode of carrying the contract in the present case into effect is this:—By a separate and independent instrument the vendor should convey the land, and, in consideration of that conveyance, the purchaser should secure the annuity by his bond. . . . This result does not appear to me to militate with the case of *Winter v. Lord Anson*, (3 Russ. 488,) nor do I dispute the authority of that case. In fact, both the cases of *Clarke v. Royle*, (3 Sim. 499,) and *Buckland v. Pocknell*, are distinguished from that; and one of the *grounds on which the Vice-Chancellor of England went, in *Buckland v. Pocknell*, was, that it would [*262] be quite inconsistent with the mode in which the parties had dealt, to say that there should be a lien for the purchase-money during the lives of the annuitants." See also *Dyke v. Rendall*, 2 De G. Mac. & G. 209; *Stuart v. Ferguson*, Hayes, Ir. Exch. Rep. 452.

From the foregoing cases we may conclude, that, although the mere giving of a bond, bill of exchange, promissory note, or covenant, for the purchase-money, or the granting of an annuity secured by a bond or a covenant, will not be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, and was, in fact, the thing bargained for, the lien will be lost.

An actual agreement, though by parol, to accept a security, and rely upon it alone, will, it seems, discharge the vendor's lien for unpaid purchase-money. See 1 S. & S. 445, where Sir John Leach observes, "That it is the vendor who in the first place attempts to raise an equity against the allegation of the deed; and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made."

If a vendor, who knows the purchase-money is trust-money, suffers one of the trustees to retain part of it, without the knowledge of the co-trustees or the cestuis que trust, he has no lien on the estate for the part so retained: *White v. Wakefield*, 7 Sim. 401; and see *Price v. Blakemore*, 6 Beav. 507.

Where there was a stipulation that the purchaser should be paid *within two years after a re-sale*, it was held that the vendor's lien was gone: *Ex parte Parkes*, 1 G. & J. 228.

It has been held, that, if a vendor take a totally distinct and independent security for the unpaid purchase-money, it will then become a case of substitution for the lien, instead of a credit given. Thus, in *Nairn v. Prowse*, 6 Ves. 752, Sir William Grant, M. R., held, that a vendor's equitable lien upon an estate, for the purchase-money, was lost by his taking, as a special security, a long annuity of 100*l.* a-year, by way of a pledge. "Suppose," said his Honor, "a mortgage was made upon another estate of the vendee, will equity, at the same time, give him what is in effect a mortgage upon the estate he sold; the obvious intention of burthening one estate being, that the other shall remain free and unincumbered? Though in that case the vendee would be a creditor, if the mortgage proved deficient, yet he would not be a creditor

[*263] by lien upon the *estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money. In this case the vendor trusts to no personal security of the vendee, but gets possession of a long annuity of 100*l.* a-year, which, according to the rise or fall of stock, might or might not be sufficient for the purchase-money. He has, therefore, an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motive for parting with his stock, but to have the absolute dominion over the land?"

The case put by Sir William Grant, that a mortgage of another estate will be a substitution for the lien, must, it seems, be qualified in the manner laid down by Lord Eldon in the principal case: as the question will be, whether, from the circumstances attending the mortgage, the intention of the vendor to give up the lien can be clearly and satisfactorily implied: see *Cowell v. Simpson*, 16 Ves. 278; 2 Ball & B. 515. But where a bond was given for the unpaid purchase-money, and a mortgage on part of the purchased estate, the intention, that the lien should not extend over the rest of the estate, was held to be sufficiently clear: *Capper v. Spottiswoode*, Taml. 21. So, likewise, in *Bond v. Kent*, 2 Vern. 281, where the vendor took a mortgage of the estate for part of the purchase-money, and a note for the remainder, it was held that he had no lien for the money due on the note; "because," as observed by Lord Redesdale, in commenting on that case, "it was manifestly the intention of the parties that the amount of the note should not be a lien on the lands, else they would have had a mortgage for the whole; the seller took the estate for his debtor for part of the purchase-money, and was content with the note for the remaining part." See *Hughes v. Kearney*, 1 S. & L. 135.

In *Cood v. Pollard*, 9 Price, 544; 10 Price, 109, the purchaser, with the concurrence of the vendor, mortgaged the estate for a sum which the vendor received in part payment of the purchase-money, taking bills, which were ultimately dishonored, for the remainder: it was held, that the vendor had no lien on the purchase-money arising from a second sale, in preference to the mortgagee.

Marshalling for Lien.—In the principal case, Lord Eldon expressed some doubt, although it was not necessary to decide the point, whether, on the death of the vendee, without having paid his purchase, a court of equity would marshal his assets in favor of *third parties*, by allowing them, in case the vendor, having a lien on the real estate, should exhaust the personalty, to stand in his [*264] place on the real estate to *the extent of his lien. In *Coppin v. Coppin*, Sel. Ch. Ca. 28, Lord King held, that the ordinary rule of marshalling would not apply to such a case; and in *Pollexfen v. Moore*, 3 Atk. 273, Lord Hardwicke said, "That this equity (i. e. the lien for unpaid purchase-money) will not extend to a third person, but is confined to the vendor and vendee." It has, however, been repeatedly decided, overruling *Coppin v. Coppin*, and the dictum in *Pollexfen v. Moore*, that the lien of a vendor must be subjected to the ordinary rule of marshalling assets, and that, consequently, when the purchased estate descends, the estate and personal assets will, as against the heir, be marshalled in favor of simple contract creditors

and legatees, (*Trimmer v. Bayne*, 9 Ves. 209; *Sproule v. Prior*, 8 Sim. 189;) and, where the purchased estate is devised, as against the devisees, in favor of simple contract creditors, (*Selby v. Selby*, 4 Russ. 336; *Emuss v. Smith*, 2 De G. & Sm. 722,) but not in favor of legatees, (*Wythe v. Henniker*, 2 My. & K. 635;) but now, freehold and copyhold estates are, under the statute 3 & 4 Will. 4, c. 104, assets for the payment of debts by simple contract, in all cases coming within the operation of the statute; the doctrine of marshalling is inapplicable and such debts will be satisfied when necessary out of those estates.

The doctrine of marshalling will form the subject of another note, and is only mentioned here on account of the doubt thrown out by Lord Eldon in the principal case, as to its being extended to the vendor's lien for unpaid purchase-money.

The vendor's lien is assignable even by parol, (*Dryden v. Frost*, 3 My. & Cr. 670:) but the assignee will take it subject to any prior incumbrances created by the vendor: *Lacey v. Ingle*, 2 Ph. 413.

Vendee's Lien for prematurely paid Purchase-Money.—If the purchase-money, or part of it, has been paid prematurely, before a conveyance, the vendee will have a lien upon the estate in the hands of the vendor, even it seems although he may have taken a security for his money. This doctrine has been laid down in various cases, and it has been the subject of great consideration in the recent case of *Wythes v. Lee*, 3 Drew. 396; there the defendant, a mortgagee, who held the mortgage, as to the greater part, in trust for several persons; as to a part, as mortgagee for himself, selling under a power of sale, contracted to sell the mortgaged estate for £380,000, and the plaintiff paid £38,000, part of the purchase-money, by way of deposit. A bill having been filed by the purchaser, claiming a lien on the estate for his deposit, a demurrer to the bill was overruled *by Sir R. T. Kindersley, V. C. [*265] “The point,” said his Honor, “most discussed, and the most important, is this abstract question. Suppose a person, absolute beneficial owner in fee of an estate, contracts to sell it, and the purchaser pays a deposit in part payment of the purchase-money, and by reason of the vendor being unable to make a title, or from any other reason, not being misconduct on either side, the contract goes off, and cannot be completed; has the purchaser a lien on the estate for his deposit? That is the most important question. If there is a right of lien, as that is a right in equity, it follows that it must be capable of being enforced by bill.

“Now, that question I have looked at in three different points of view:—

1. With reference to natural justice, irrespectively of any specific rule of law; and it does appear to me that it is consistent with natural justice, that if a purchaser on the faith of the contract being completed, and the estate becoming his, has advanced money in payment, or part payment, for the purchase, he has advanced it under circumstances which entitle him to say, ‘If you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the estate.’ 2. With reference to the general law of this Court, I do not mean with reference to decided cases, but to the general law

and principles of this Court. This is clear, that the *vendor*, if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the *purchaser*, if the contract goes off, stand in principle on the same footing as that of the vendor? The only distinction that occurs to me is this;—the vendor, when he contracts to sell his estate, is owner; he has the estate in his own possession, at least under his own control; and when he contracts to sell, his right is to say, ‘I will convey the estate when the purchase-money is paid, but till that is done, I will not convey it.’ That right creates a lien of itself, very analogous to the common law lien; and that lien, which exists before conveyance, still continues; it is not a new, but the same lien. But with regard to the purchaser, he has not the estate in his possession, and his lien is not in its origin the same sort of lien as that of the vendor. But when a contract is made and then goes off, it appears to me, that, in principle and justice, the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance. A difficulty has been suggested, that with regard to a vendor, by taking an additional security for the purchase-money, as a general rule, he loses his right to his lien, and a [*266] purchaser does *not. The ground of the distinction I am at a loss to understand. But however that may be, it appears to me that, on principles of equity and justice, the purchaser, when the contract goes off, has a lien.” His Honor then examining this subject in a third point of view, viz., as to the authorities, after noticing the dictum in *Burgess v. Wheate*, referred to in the principal case, (*ante*, p. 247;) and the opinion of Lord St. Leonards, in his work on Vendors and Purchasers, (see vol. ii. p. 857, 11th ed.,) and observing, that “there is no single case in which any such claim has been made by a purchaser,” added: “But I do not see any inconvenience in establishing the rule; I do not see any hardship in it. It is true that in some cases the Court has refused to order the deposit to be returned; but those have all been cases in which the bill was for other purposes, and the return of the deposit was collateral. I do not see what mischief could result from entertaining a bill for the single purpose of establishing the right to a lien for the deposit; and, if it were necessary for me now to determine the question of the right to a lien, I should feel great difficulty in getting over the authorities on the subject, the dictum in *Burgess v. Wheate*, the observations of Lord Eldon, in *Mackreth v. Symmons*, and the opinion of Lord St. Leonards, especially as I think natural justice is strongly in favor of the doctrine.” But his Honor did not decide whether, in the peculiar circumstances of the case, the vendee would have a lien for the purchase-money as against the mortgagor or the persons for whom the mortgagee was trustee.

It seems, however, that where a purchaser prematurely pays part of the purchase-money to a mortgagee selling under a power of sale, he would have a lien upon the interest of the mortgagee. “There is,” said Kindersley, V. C., “certainly a ground of equity for that; for though that which was the subject of sale was a fee-simple, there is justice in saying, if the vendor is entitled to some lesser interest, to the extent of that interest, the

purchaser is entitled to the lien." See *Wythes v. Lee*, 3 Drew. 406; *Burgess v. Wheate*, 1 Eden, 211; *Lacon v. Mertins*, 3 Atk. 1; *Oxenham v. Esdaile*, 2 Y. & J. 493; 3 Y. & J. 262.

Where it turns out that another person is, under the contract of sale, entitled to the estate, the person taking the conveyance to himself, or his assignees, will have a lien for the purchase-money that he has paid. *Nesom v. Clarkson*, 4 Hare, 97. But the lien will not exist where the purchaser has by his own default abandoned the contract, (*Dinn v. Grant*, 5 De G. & Sm. 451,) nor where the contract is by statute illegal, (*Eving v. Osbaldiston*, 2 My. & *Cr. 88.) *Secus*, if the purchaser repudiates the contract where [*267] vendor cannot make a good title, or where the sale constitutes a breach of trust, (*Wythes v. Lee*, 3 Drew. 396.)

Estate in the hands of Third Parties, when Bound by Lien.—The equitable lien for unpaid purchase-money will, as is laid down in *Mackreth v. Symmons*, bind the estate not only in the hands of the purchaser and his heirs, and persons taking from them as volunteers, but also in the hands of purchasers for valuable consideration, who bought with notice that the purchase-money remained unpaid, (*Hearle v. Botelers*, Cary's Ch. Rep. 35; *Walker v. Preswick*, 2 Ves. 622; *Hughes v. Kearney*, 1 S. & L. 135; *Winter v. Lord Anson*, 3 Russ. 488; S. C., 1 S & S. 434; *Frail v. Ellis*, 16 Beav. 350, 354;) but the lien will not prevail against a bona fide purchaser who bought without notice that the purchase-money remained unpaid, (*Cator v. Earl of Pembroke*, 1 Bro. C. C. 302;) and, although the title is deduced from the first vendor, in recital, still that will not be sufficient to affect the purchaser with notice, if the recital does not show that the estate was not paid for: *Cator v. Earl of Pembroke*, 1 Bro. C. C. 302. See, however, *Davies v. Thomas*, 2 Y. & C. Exch. Ca. 234; in which case a reference, in the conveyance of the second purchasers to the will under which the sale was made, was held to be sufficient notice of a lien not appearing upon the face of the will, upon the ground that notice of the will ought to have put the purchasers upon inquiries which would have led to the discovery of the lien. The authority of this case, as to what is to be deemed sufficient notice, seems doubtful. See Sugd. V. & P. 819, 11th ed.

The fact of the vendee remaining in possession of the estate as lessee, where the vendor has acknowledged the receipt of the purchase-money in the body of the deed and by endorsement, will not be notice of the purchase-money remaining unpaid, so as to cause the lien to attach: *White v. Wakefield*, 7 Sim. 401.

But where the vendor claiming a lien retains the conveyance and the title deeds, a subsequent purchaser or mortgagee may be affected with notice of the lien: *Worthington v. Morgan*, 16 Sim. 547; and see *Hewitt v. Loosemore*, 9 Hare, 449; *Finch v. Shaw*, 18 Jur. 937.

If the legal estate is outstanding, then, as the second purchaser has only an equitable interest, subsequent to that of the equitable lien, the maxim, "*Qui prior est tempore potior est jure*," may, as in the principal case, apply; and the equitable lien will have precedence.

[*268] Where, however, the equity of a second purchaser or mortgagee *having only an equitable interest is better than that of the vendor claiming a lien for unpaid purchase-money, such purchaser or mortgagee will be entitled to priority over the lien.

This subject has been much discussed in the important and leading case of *Rice v. Rice*, 2 Drew. 73. There certain leasehold property was assigned to a purchaser, by a deed which recited the payment of the whole purchase-money, and had the usual receipt endorsed on it, and the title deeds were delivered up to the purchaser. Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deed, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded, without paying either the vendors or the equitable mortgagees. It was held by Sir R. T. Kindersley, V. C., that the defendants, the equitable mortgagees, having the better equity, were entitled to payment out of the estate in priority to the claim of the vendors for their lien. "In a contest," said his Honor, "between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e., a court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them; or, in other words, that their equities are in all other respects equal; and that if one has, on other grounds, a better equity than the other, priority of time is immaterial. . . . So far as relates to the nature and quality of the two equitable interests, abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the ground of Lord Eldon's decision in *Mackreth v. Symmons*, where, in a contest between the vendor's lien for unpaid purchase-money, and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favor of the former, as being prior in point of time. . . . If, then, the vendor's lien for unpaid purchase-money, and the right of an equitable mortgagee, by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other? One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title-deeds." . . . And his Honor, after referring to *Foster v. Blackstone*, (1 My. & K. 307;) *Stanhope v. Verney*, (Butler's Co. Litt. 290, b, note (1.), sect. 15; 2 Eden. 81;) 3 [*269] Sugd. V. & P. 218; and *Maundrell v. Maundrell*, (10 Ves. 271,) adds: "We have here ample authority for the proposition, or rule of equity, that as between two persons, whose equitable interests are precisely of the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity. And applying this rule to the present case, it appears to me that the equitable interests of the two parties being, in their nature and quality, of equal worth, the defendant, having possession of the

deeds, has the better equity; and that there is, therefore, in this case, no room for application of the maxim, 'Qui prior est tempore potior est jure,' which is only applicable where the equities of the two parties are, in all other respects, equal. I feel all the more confidence in arriving at this conclusion, inasmuch as it is in accordance with the opinion expressed by Lord St. Leonards in his work on Vendors and Purchasers. And I have no doubt, that, in *Mackreth v. Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title-deeds from his mortgagor, Lord Eldon would have decided in his favor." And his Honor, after guarding against the supposition that he meant to express an opinion that the possession of the title-deeds would, in all cases, and under all circumstances, give the better equity, and after referring to *Allen v. Knight*, (5 Hare, 272; 11 Jur. 527,) says, "It appears to me that in all cases of contest between persons having equitable interests, *the conduct of the parties and all the circumstances*, must be taken into consideration, in order to determine which has the better equity. And if we take that course in the present case, everything seems in favor of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase-money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared, in the most solemn and deliberate manner, both in the body, and by a receipt endorsed, that the whole purchase-money had been duly paid. They might still have required that the title-deeds should remain in their custody, with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase-money; and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal, and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser, *in mortgaging the estate by the deposit of the deeds, has done the vendors [*270] any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity."

The assignees of a bankrupt will be affected by the equitable lien, although they may have had no notice of it; for it is a clear principle that assignees in bankruptcy take subject to all the equities attaching to the bankrupt; *Bowles v. Rogers*, 6 Ves. 95, cited in note (a); *Ex parte Hanson*, 12 Ves. 349; *Mitford v. Mitford*, 9 Ves. 99; *Grant v. Mills*, 2 V. & B. 306; *Ex parte Peake*, 1 Madd. 346. So, also, will the assignees under a general assignment for the benefit of creditors: *Fawell v. Heelis*, Amb. 724; and see 1 Bro. C. C. 302.

Where a vendor takes a security for his purchase-money, as, for instance, a bond, he will not be permitted to sue at law and in equity at the same time, but must elect in which court he will proceed: *Barker v. Smark*, 3 Beav. 64.

A vendor's lien for unpaid purchase-money not being an express trust, his right to recover it may be barred by the 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, (*Toft v. Stephenson*, 7 Hare, 1;) but a case may be taken out of the operation of the statute by a sufficient acknowledgment, (S. C., 1 De G. Mac. & G. 28; 5 De G. Mac. & G. 735;) and thereupon, payment of the purchase-money remaining unpaid, and arrears of interest may be enforced in equity: *Ib.*

The vendor's lien for unpaid purchase-money has been held not to be "a charge by way of mortgage" within the meaning of 17 & 18 Vict. c. 113; hence the personal estate of the deceased purchaser will remain primarily liable for its payment: *Hood v. Hood*, 5 W. R. 747.

The English chancery doctrine of the vendor's equitable lien for unpaid purchase-money, upon an absolute conveyance of land, is adopted in several of the States of this country, viz. New York, Maryland, New Jersey, California, Virginia, Tennessee, Mississippi, Georgia, Alabama, Missouri, Illinois, Indiana, Ohio, Kentucky, Vermont, and Texas; *Delassus v. Paston*, 19 Missouri, 425; *Herbert v. Scofield*, 1 Stockton's Ch. 492; *Pincham v. Collard*, 13 Texas, 333; *Salmon v. Hoffman*, 2 California, 138; *M' Candlish v. Keen*, 13 Grattan, 615; *Carr v. Hobbs*, 11 Maryland, 285; and has been recognized in the Circuit and Supreme Courts of the United States; *Gilman v. Brown et al.*, 1 Mason, 192, 212; S. C., 4 Wheaton, 256; *Bailey v. Greenleaf*, 7 Id. 46; *English v. Russell*, 1 Hempstead, 35. In the recent case of *Manly et al. v. Slason et al.*, 21 Vermont, 271, the doctrine was, after full consideration, approved and adopted: see also, *Weed v. Beebe et al.*, Id. 496, 501; while in *Burns v. Taylor*, 23 Alabama, 255, it was said to apply with as much force to an exchange, as to a sale for money. In

some other States, it has been condemned and abandoned. In Pennsylvania, the whole principle has been rejected; a vendor, after an absolute conveyance of the legal title, has no implied lien for the purchase-money; *Kauffelt v. Bower*, 7 Sergeant & Rawle, 64; *Semple v. Burd*, Id. 286; *Mergargel v. Saul*, 3 Wharton, 19; *Hepburn v. Snyder*, 3 Barr, 72, 78: though there may be a conditional conveyance of the title, that will give the claim for purchase-money a priority over all claiming through the vendee; *Bear v. Whisler*, 7 Watts, 144; see *Cook v. Trimble*, 9 Id. 15; *Zentmyer v. Mittover*, 5 Barr, 403, 408. In North Carolina, after some fluctuation of opinion; (*Wynne v. Alston*, 1 Devereux's Equity, 163; *Johnson v. Cawthorn*, 1 Devereux & Battle's Equity, 32; *Crawley v. Timberlake*, 1 Iredell's Equity, 346, 348;) the doctrine of an implied lien after an absolute conveyance is now entirely expelled; *Womble v. Battle*, 3 Iredell's Equity, 182, (A. D. 1844.) In South Carolina, also, it appears to be completely rejected; *Wragg's Representatives v. Comp. Gen. and others*, 2 Dessaus-

sure, 509, 520. In Massachusetts and Maine, it has no existence: per Story, J., in *Gilman v. Brown et al.*, 1 Mason, 192, 219; *Philbrook v. Delano*, 29 Maine, 410, 415. In Connecticut and Delaware, its existence remains undecided and doubtful; *Atwood v. Vincent*, 17 Connecticut, 576, 583; *Budd et al. v. Busti and Vanderkemp*, 1 Harrington, 69, 74. In some of the courts, in which its existence has been recognized, it has been considered as a dangerous principle, and one opposed to the prevailing policy of this country which discourages secret liens, and tends to make all matters of title the subject of record evidence. See the remarks of Marshall, C. J., in *Bayley v. Greenleaf*, 7 Wheaton, 46, 51; of Carr, J., in *Moore et al. v. Holcombe et al.*, 3 Leigh, 597, 600, 601; of Tucker, P., in *Brawley v. Catron, &c.*, 8 Id. 522, 527; and of Treat, J., in *Conover v. Warren et al.*, 1 Gilman, 498, 502.

The doctrine, in its general statement, is, that the vendor of land, if he has taken no security, although he has made an absolute conveyance by deed, with a formal acknowledgment in the deed or on the back of it, that the consideration has been paid, yet retains an equitable lien for the purchase-money, unless there be an express or implied waiver and discharge of it; and this lien will be enforced in equity against the vendee, volunteers, and all others claiming under him with notice; that is, against all persons except *bona fide* purchasers without notice; *Stafford v. Van Rensselaer*, 9 Cowen, 316, 318; *Tompkins v. Mitchell*, 2 Rand. 428, 429; *Cox v. Fenwick*, 3 Bibb, 183, 184; *Thornton, &c. v. Knox's Ex'r*, 6 B.

Monroe, 74, 75; *Williams v. Roberts et al.*, 5 Ohio, 35, 39; *Ross v. Whitson*, 6 Yerger, 50; *Deibler v. Barwick*, 4 Blackford, 339, 340; *Dyer v. Martin et al.*, 4 Scammon, 148, 151; *Hall's Ex'rs v. Click et al.*, 5 Alabama, 363, 364; *Stewart et al. v. Ives et al.*, 1 Smedes & Marshall, 197, 206; *Upshaw et ux. v. Hargrove*, 6 Id. 286, 291; *Marsh v. Turner and Lisle*, 4 Missouri, 253; *Manley et al. v. Slason et al.*, 21 Vermont, 271; *Briscoe v. Bronaugh*, 1 Texas, 326, 330; *Pintard v. Goodloe*, 1 Hempstead, 502; *Tiernan v. Thurman*, 14 B. Monroe, 277. This lien is recognized, to the same extent, in case of a sale of an equitable title as of a legal one; *Stewart v. Hutton*, 3 J. J. Marshall, 178; *Ligon v. Alexander, &c.*, 7 Id. 288, 289; *Galloway v. Hamilton's Heirs, &c.*, 1 Dana, 576; *Iglehart v. Armiger*, 1 Bland, 519, 526, 527; though the point was left undecided in the Court of Appeals in Maryland; *Schnebly & Lewis v. Ragan*, 7 Gill & Johnson, 120, 124; and some difference of opinion existed upon it in the Supreme Court of the United States, in *Bayley v. Greenleaf*, 7 Wheaton, 46, 50. The principle is, that this lien exists in equity, presumptively, when the purchase-money, or any part of it, remains unpaid; and it is for the vendee to show such circumstances as repel the presumption or rebut the equity; *Garson v. Green*, 1 Johnson's Chancery, 308, 309; *Gilman v. Brown et al.*, 1 Mason, 192, 213; *Schnebly and Lewis v. Ragan*, 7 Gill & Johnson, 120, 125; *Tompkins v. Mitchell*, 2 Randolph, 428, 429; *Allen et al. v. Bennett*, 8 Smedes & Marshall, 672, 681; *Campbell v. Baldwin et als.*, 2 Humphreys, 248, 258; *Marshall v. Christ-*

mas et als., 3 Id. 616, 617; *Tinsbody v. Jacobson*, 2 California, 269. An acknowledgment, in the body of the deed, or on the back of it, of the receipt of the whole purchase-money, if the money has in fact not been paid, will not be a waiver or discharge of this lien; *Gilman v. Brown et al.*, 1 Mason, 192, 214; *Redford v. Gibson*, 12 Leigh, 332, 344; *Eubank v. Poston, &c.*, 5 Monroe, 285, 287; *Tribble, &c. v. Oldham*, 5 J. J. Marshall, 137, 144; *Sheratz v. Nico-demus*, 7 Yerger, 9; nor will a recital in the deed that the consideration is "paid or secured to be paid;" *Thornton, &c. v. Knox's Ex'r*, 6 B. Monroe, 74, 76; nor will the circumstance that the money is not to be payable till after the death of a particular person, and then only contingently, as where a part of the consideration is retained as an indemnity against a possible claim of dower; *Redford v. Gibson*, 12 Leigh, 332, 347; but this lien will not be given by a court of equity as a security for unliquidated and uncertain damages, and will therefore not exist when the consideration of the sale is an engagement to support the vendor during his life; *Brawley v. Catron, &c.*, 8 Leigh, 522, 528. [Hence, whenever the language of the deed, or the nature of the covenants which it contains, are such as to indicate that the vendor relied solely on the personal credit and responsibility of the vendee, he cannot resort to a lien on the land; *M' Candlish v. Keen*, 13 Grattan, 605; and being a mere equity, it will necessarily be disproved or rebutted, whenever the circumstances of the case are such as to show, that it cannot be enforced without violence to the intention of the parties, or that

it would be unfair and inequitable to enforce it; *The Elysville Man. Co. v. The Ohio Ins. Co.*, 5 Maryland, 152; *Carter v. The Bank of Georgia*, 24 Alabama, 37; and it has been said to be doubtful, whether an equity which is confined exclusively to sales of land; *James v. Bird*, 8 Leigh, 51; will arise when real and personal property are conveyed by one deed, under an entire contract, for one and the same consideration; *M' Candlish v. Keen.*]

In regard to the effect upon this equitable lien, of the vendor's taking a security, the American cases agree in establishing and applying the following simple and satisfactory rule:—that the implied lien will be sustained wherever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it be manifested, and therefore that any bond, note or covenant, given by the vendee alone will be considered as intended only to countervail the receipt for the purchase-money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien: and on the other hand, that the lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage or other land, or pledge of goods, or personal responsibility of a third person, and also when a security is taken upon the land, either for the whole or a part of the unpaid purchase-money; unless there is an express agreement that the implied lien shall be retained. See this distinction recognized in *Gilman v. Brown et al.*, 1 Mason, 192, 214, &c.; *Fish v. Howland*, 1 Paige, 20, 30; *Warner v. Van Alstyne*, 3 Id. 513,

514; *Shirley v. Sugar Refinery*, 2 Edwards, 505, 507; *Lagow v. Badollet*, 1 Blackford, 417, 419; *Boon v. Murphy*, 6 Id. 273, 276; *Conover v. Warren et al.*, 1 Gilman, 498, 501; *Williams v. Roberts et al.*, 5 Ohio, 35, 40; *Eskridge v. McClure and Walker*, 2 Yerger, 84, 85; *Marshall v. Christmas et als.*, 3 Humphreys, 616; *Foster v. The Trustees of the Athenæum*, 3 Alabama, 302, 306; *Palmer and others, Appellants*, 1 Douglas, 422, 427; *Mims v. Macon & Western R. R. Co.*, 3 Kelly, 333, 343; *Manly et al. v. Slason et al.*, 21 Verm. 271; *McCandlish v. Keen*, 13 Grattan, 615, 625. It may, accordingly, be considered as settled by the unanimous concurrence of the cases in this country, that, wherever this lien is recognized at all, it will not be affected by the vendor's taking the bond, or bill single, of the vendee; *Evans v. Goodlet*, 1 Blackford, 246; *Cox v. Fenwicke*, 3 Bibb, 183, 184, 185; *Taylor v. Hunter and Searcy*, 5 Humphreys, 569; or his negotiable promissory note; *Garson v. Green*, 1 Johnson's Chancery, 308, 309; *White v. Williams*, 1 Paige, 502; *Tompkins v. Mitchell*, 2 Randolph, 428; *Clark v. Hunt*, 3 J. J. Marshall, 553, 558; *Thornton, &c. v. Knox's Ex'r*, 6 B. Monroe, 74, 75; *Aldridge v. Dunn*, 7 Blackford, 249, 250; *Ross v. Whitson*, 6 Yerger, 50; *Sheratz v. Nicodemus*, 7 Id. 9; *Manly et al. v. Slason et al.*, 21 Vermont, 271; *Pinchain v. Collard*, 13 Texas, 333; *Truebody v. Jacobson*, 2 California, 269; or a check drawn on a bank by the vendee, which is not presented or paid; *Honore's Ex'r v. Bakewell et al.*, 6 B. Monroe, 67, 72; or any instrument whatever, involving merely the personal liability of the vendee; *Mims*

v. Macon & Western R. R. Co., 3 Kelly, 333, 343: but, that taking a mortgage of other property; *White v. Dougherty et al.*, Martin & Yerger, 309, 323; (see also, *Richardson v. Ridgely et al.*, 8 Gill & Johnson, 87, 91;) or the bond or note of the vendee with a surety; *Wilson, &c. v. Graham's Executor*, 5 Munford, 297; *Francis v. Hazlerigg's Ex'rs*, Hardin, 48; *Williams v. Roberts et al.*, 5 Ohio, 35; *Mayham v. Coombs, Parker & others*, 14 Id. 428, 435; *Boon v. Murphy*, 6 Blackford, 273, 276; *Way v. Petty*, 1 Carter, 102; or a negotiable note drawn by the vendee and endorsed by a third person, or drawn by a third person and endorsed by the vendee; *Gilman v. Brown et al.*, 1 Mason, 192, 218, 219; S. C., 4 Wheaton, 256, 291; *Conover v. Warren et al.*, 1 Gilman, 498, 501; *Campbell v. Baldwin et al.*, 2 Humphreys, 248; *Marshall v. Christmas et als.*, 3 Id. 616; *Burke et al. v. Gray et al.*, 6 Howard's Mississippi, 527; *Foster v. The Trustees of the Athenæum*, 3 Alabama, 302; will repel the lien, presumptively: and in like manner, an express security on the land itself for the whole amount unpaid, as by mortgage or deed of trust, will merge the implied lien; *Little and Telford v. Brown*, 2 Leigh, 353, 355; (though the contrary was held in *Boos v. Ewing et al.*, 17 Ohio, 500, 520;) and an express security, or an express contract for a lien, on the land conveyed, as to part of the amount remaining unpaid, will be an implied waiver of the lien to any greater extent; *Brown v. Gilman*, 4 Wheaton, 256, 290, 291; *Fish v. Howland*, 1 Paige, 30, 31; *Phillips v. Saunderson et al.*, 1 Smedes & Marshall's Chan. 462, 465. But though

the mere taking of the vendee's personal security will not be a discharge of this equity or lien, yet any conduct which shows an intention to give up the lien, or which makes it inequitable for the vendor to insist upon it, as against the vendee or third persons, will, as against such persons, be a bar to its assertion; *Redford v. Gibson*, 12 Leigh, 332, 343; *Fowler v. Rust's Heirs*, 2 Marshall, 294; *Clark v. Hunt*, 3 J. J. Marshall, 553, 558; *Phillips v. Saunderson and others*; *M' Cown v. Jones*, 14 Texas, 682; and, on the other hand, the waiver arising from the acceptance of collateral security, is said to be only presumptive, and may be rebutted by evidence from other circumstances, of an intention not to rely exclusively upon it, but to retain the equitable lien; *Campbell v. Baldwin et als.*, 2 Humphreys, 248, 258; *Marshall v. Christmas et als.*, 3 Id. 616, 617; *Mims v. Macon and Western Railroad Company*, 3 Kelly, 333, 342; *Kyles v. Tail's Adm'r*, 6 Grattan, 44, 48; see *Tiernan v. Thurman*, 14 B. Monroe, 277.

The lien exists only as between the vendor and vendee, and perhaps their privies in estate or law; and then only for the unpaid purchase-money. If an obligation to maintain the vendor and a third person, be substituted for the purchase-money, such an obligation will not be a lien; *M'Killip v. M'Killip*, 8 Barbour, 553. And a lien cannot, it has been said, be reserved orally to a third person who pays the purchase-money and takes the note of the vendee as a security; *Skeggs v. Nelson*, 25 Mississippi, 88; although as a surety of the vendee is entitled to subrogation to the lien of the vendor, on payment, it would seem immaterial whether the payment is made at the

time or subsequently, if the circumstances are such as to render it a purchase and not an extinguishment; *ante*, note to *Dering v. Winchelsea*.

The vendor, having this equitable lien, may file a bill in equity to have satisfaction of it, and the court will order the land, or so much of it as may be necessary, to be sold for the discharge of the debt; *Mullikin v. Mullikin*, 1 Bland, 538, 541; *Wilson, &c. v. Davisson*, 2 Robinson's Virginia, 385, 404; *Wade's Heirs v. Greenwood*, Id. 475, 484; *M'Gee v. Beall*, 3 Littell, 190, 192; *Outton v. Mitchell*, 4 Bibb, 239. But a lien of this kind, is not an original, specific, and absolute charge on the land, but only an equity to resort to it upon the failure of the personal estate. The personal estate of the purchaser is the primary fund for the payment of the vendor's claim, and the real estate is liable, only secondarily.

Therefore, a bill in equity, to enforce the vendor's lien, must show that the complainant has exhausted his remedy at law against the personal estate, or must aver such facts as show that the complainant cannot have a full, complete, and adequate remedy at law; *Eyler v. Crabbs*, 2 Maryland, 137; but a court of equity will not compel him to proceed at law against the particular land in question; *Pratt v. Van Wyck's Ex'rs*, 6 Gill & Johnson, 495, 498; *Hall v. Maccubin*, Id. 107, 110; *Richardson v. Stillinger*, 12 Id. 478, 482; *Bottorf v. Conner*, 1 Blackford, 287; *Russell v. Todd*, 7 Id. 239; *Roper v. M'Cook & Robinson's Adm'r*, 7 Alabama, 319, 324. A different view of the nature of this lien, however, prevails in some of the courts, which consider it as in the nature of a mortgage, and hold that the

vendor may enforce this claim in equity without having obtained a judgment, or taken any steps whatever at law: *High & Wife v. Batte*, 10 Yerger, 186; *Richardson, &c. v. Baker*, 5 J. J. Marshall, 323; *Galloway v. Hamilton's Heirs*, 1 Dana, 576.

If there be an unexecuted contract of sale, the vendor may file a bill to have a specific performance, and then have the land sold for satisfaction of this lien; *Clark v. Hall*, 7 Paige, 382, 385; *Brush & Stanbury v. Kinsley, Adams & Stillwell*, 14 Ohio, 20.

In the distribution of a decedent's, or an insolvent's estate, equity will marshal the assets, so as to put the vendor altogether upon his equitable lien, for the benefit of other creditors; *Iglehart v. Armiger*, 1 Bland, 519, 524; and perhaps of legatees; see *Schnebly & Lewis v. Ragan*, 7 Gill & Johnson, 120, 126.

In regard to the question, whether the benefit of the vendor's lien accompanies an assignment of the vendee's note or bond for the purchase-money, the cases are in direct conflict. It seems to be settled, that if a debt is secured by an express lien, as, where there is a mortgage, or an agreement for a lien, which creates an equitable mortgage, or where the vendor has not parted with the legal title, an assignment of the debt entitles the assignee to the benefit of the pledge; *Graham v. M^c Campbell*, Meigs, 52, 55; *Eskridge v. M^c Clure and Walker*, 2 Yerger, 84, 87; *Tanner v. Hicks et al.*, 4 Smedes & Marshall, 294, 300; see, also, *Norvell v. Johnson et als.*, 5 Humphreys, 489, 491: but a vendor's equity, or implied lien, is not necessarily governed by the same principle. In Kentucky and Indiana, indeed, it appears to be

settled that there is no distinction between the vendor's implied lien and any express lien, as to transferability, and that an assignment of the note or bond for the purchase-money carries the lien with it; *Kenny v. Collins*, 4 Littell, 289; *Johnston v. Gwathmey, &c.*, Id. 317; *Eubank v. Poston, &c.*, 5 Monroe, 285, 287; *Edwards v. Bohannon*, 2 Dana, 98; *Honore's Ex'r v. Bakewell et al.*, 6 B. Monroe, 67, 71, 72; *Ripperdon v. Cozine, &c.*, 8 Id. 465, 466; *Lagow v. Badollet*, 1 Blackford, 417, 419, 420; *Brumfield v. Palmer*, 7 Id. 227, 230; *Fisher v. Johnson*, 5 Indiana, 492; and in Alabama, though an assignment of a note, expressly, "without recourse," does not transfer the lien; *Hall's Ex'rs v. Click et al.*, 5 Alabama, 363, 364; yet an endorsement not thus restricted, does transfer the lien; *Roper v. M^c Cook and Robertson's Adm'r*, 7 Id. 319; *White v. Stover et al.*, 10 Id. 441; *Plowman and M^cLean v. Riddle*, 14 Id. 169, 171. Elsewhere, however, the decisions have been different; and the weight of authority is decidedly against this lien's accompanying a transfer of the debt; *Webb v. Robinson*, 14 Georgia, 216. In Ohio and Tennessee it is well settled, that this lien is merely a personal and equitable right, not passing with the assignment of the vendee's obligation, but extinguished when an assignment takes place; *Jackman v. Hallock & others*, 1 Ohio, 318; *Tiernan v. Beam & others*, 2 Id. 383; *Brush & Stanbury v. Kinsley, Adams & Stillwell*, 14 Id. 20, 24; *Horton v. Horner*, Id. 437, 443; *Claiborne v. Crockett*, 3 Yerger, 27, 35; *Gann v. Chester*, 5 Id. 205, 207; *Sheratz v. Nicodemus*, 7 Id. 9, 13: and the

same thing had been held in North Carolina, before the whole doctrine was rejected from that State; *Green et al. v. Cockett et al.*, 2 Devereux & Battle's Equity, 390, 392. In New York and in Mississippi, also, it has been decided that an endorsement of the vendee's negotiable note, where the assignor has not been made liable upon his endorsement, does not carry the lien by implied assignment, it being left undetermined, in these cases, whether the lien is transferable by a special conveyance; *White v. Williams*, 1 Paige, 502, 506; *Briggs et al. v. Hill*, 6 Howard's Mississippi, 362, 364; see *Briggs, Lacoste & Co. v. The Planters' Bank*, 1 Freeman's Chancery, 574, 584. In Maryland, also, it was settled in the Court of Appeals, that an assignment, with an express agreement that the assignor should in no case be made liable, extinguished the lien, it neither passing to the assignee, nor remaining operative in favor of the assignor: "The lien," the court said, "was intended to secure the payment of the purchase-money to the vendor;" and the assignment of the notes without responsibility for their ultimate payment, amounted, as far as the vendor was concerned, to absolute payment and satisfaction of his claim; *Schnebly & Lewis v. Ragan*, 7 Gill & Johnson, 120, 126. And in the Court of Chancery, in that State, it has been decided that this lien is, in its nature, unassignable, and that an assignment of the note or bond extinguishes the lien; *Iglehart v. Armiger*, 1 Bland, 519, 524, 525; *Hayden v. Stuart*, 4 Maryland, Ch. 280; see, however, *Hall v. Maccubin*, 6 Gill & Johnson, 107, 109. Those cases which hold that an endorsement or assignment,

upon which the assignor is not made liable, does not transfer, but extinguishes the lien, but that if the endorser is made liable, the lien is not extinguished, do in fact adjudge this lien to be not assignable; the view which they take is, that the endorsee or assignee, in a suit against the vendee, cannot enforce the lien, but that if he recovers against the endorser, the latter, getting the note back, may enforce his original lien against his vendee. This is deciding, in the clearest manner, that the lien is not assignable. But though the balance of authorities is thus, altogether, against the transferability of this equity, there seems to be no doubt, that a surety for the payment of the purchase-money, may, after discharging it, claim to be subrogated to the vendor's rights in respect to it; *ante*, 150; see *Tompkins v. Mitchell*, 2 Randolph, 428; *Melery v. Cooper*, 2 Bland, 199, note.

[It is, however, difficult to understand how a surety can be subrogated to that which cannot be assigned, or how any one can be entitled to use a right for himself, and yet unable to exercise it for the benefit of another. Subrogation is, in effect, an assignment, or transfer, by implication or operation of law, as deduced from the act or contract of the parties; and every equitable assignment is carried into effect by subrogating the assignee to the rights and remedies of the assignor. Rights which do not admit of subrogation, may therefore be unassignable, but those which do, may always be made the subject of an assignment under proper circumstances. If a vendor, who negotiates a note given for the purchase-money, can recur to the lien for his own protection,

if the note be thrown back upon him, he may certainly bind himself to enforce it for the protection of the endorsee, and thus confer a right or interest to, or in the lien on the latter. We may therefore infer, that the endorsement of a note, or other negotiable instrument, will transfer the lien to the endorser, unless the endorsement is accompanied with a waiver of the right of recourse against the endorser; *Grigsby v. Hair*, 25 Alabama, 327. When, however, the nature of the debt, or of the assignment, is such as to free the assignor from all responsibility for its payment, and thus deprive him of all interest in the lien, the better opinion would seem to be, that it will not vest in the assignee, by construction or implication, nor unless the parties show that they meant to keep it alive for his benefit; but that full effect will be given to an intention of transfer, when sufficiently manifested, either by acts or language; *Dixon v. Dixon*, 1 Maryland, Ch. 220; *Watson v. Bane*, 7 Maryland, 117; *Fisher v. Johnson*, 5 Indiana, 492.

The question was elaborately examined in *Watson v. Bane*, 7 Maryland, 117, and the union of the vendor and vendee, in a mortgage given for a debt of the vendee, held to extinguish the vendor's lien, and give priority to a judgment obtained subsequently to the sale, over the mortgage, thus invalidating a right which it was the plain intent of the parties to extend and secure. In this case, however, the vendee held a mere equity, no conveyance having been made to the vendor prior to the mortgage; and the court seem to have overlooked the distinction between the legal right, which grows out of

the retention of the legal title, and the lien implied by chancery, when a conveyance has been made, and all hold on the land is gone, at law. The latter is the creature of an equitable presumption, while the former is the land itself, and confers all the rights incident to the ownership of land, except in so far as they may be modified by equity. In the case under consideration, the equity of the judgment creditor was limited to that of the purchaser, against whom he held the judgment, and consequently rose no higher than a right to a conveyance of the legal title upon, and after the payment of the purchase-money to the vendor, and the mortgagee claiming under him. It is no doubt true, that when a vendor, who has retained the legal title in his own hands, subsequently conveys it for the purpose of enabling the vendee to execute a mortgage or conveyance to a third person, the equitable lien for the unpaid purchase-money will be waived, or, more properly speaking, will not come into existence, because the object which the parties have in view requires that the title should vest in the grantee, free from all lien or claim for the purchase-money; *Clower v. Rawlings*, 9 S. & M. 122; *Lynch v. Dearth*, 2 Penna. R. 101. Under these circumstances, however, if the conveyance be made with a view to the execution of the mortgage, and the mortgage executed on the faith of the conveyance, so that the whole forms one transaction, the conveyance should be regarded as a mere *conduit pipe* for the transfer of the title from the vendor to the mortgagee, free from the incumbrances which may have attached to the equitable estate of the vendee, and the mortgagee given that

priority which has been relinquished in his favor by the vendor; *Campbell's Appeal*, 6 Amer. Law Register, 751, 765. This is, undoubtedly, at variance with the case of *Watson v. Bane*, but would seem the only rule which can give effect to the intention of the parties, or satisfy the requisitions of justice.]

In *Moreton v. Harrison*, 1 Bland, 491, and *Lingan v. Henderson*, Id. 236, 281, Mr. Chancellor Bland, upon the ground that this lien was a trust in the land, held that it was not barred when the personal security or debt was barred; but that it would continue till the presumption of payment accrued; and that, though it would be presumed to be at an end after twenty years, yet that presumption might be rebutted by circumstances, and the lien might be enforced after a still longer period. But this appears to be altogether erroneous. Even if it is a trust, it is not a direct trust for the payment of a debt, (as in *Alexander v. M'Murry*, 8 Watts, 504, and *Addams v. Heffernan*, 9 Id. 530;) but only a collateral trust for the security of the debt, and must be inoperative when the debt is barred. See the remarks of Catron, C. J., in *Sheratz v. Nicodemus*, 7 Yerger, 9, 12. And the better opinion would, unquestionably, seem to be, that as it is a remedy or security, not a right of property, and does not vary the nature of the debt, or take it out of the operation of the Statute of Limitations, it cannot be enforced after the bar of the statute has attached to the debt; *Borst v. Corey*, 15 New York R. 505; *Trotter v. Erwin*, 27 Mississippi, 772.

This equity of a vendor, as has already been said, will be enforced against the vendee, and all standing

in his position: against his heirs; *Garson v. Green*, 1 Johnson's Chancery, 308, 309; *Wade's Heirs v. Greenwood*, 2 Robinson's Virginia, 475, 484; and as against them it will attach upon improvements made on the land by the vendee in his lifetime; *Warner v. Van Alstyne*, 3 Paige, 513, 514; and upon a sale of the land for debts, after the vendee's death, the purchase-money is first to be paid out of the proceeds; *White v. Casanave*, 1 Harris & Johnson, 106: against his widow's right of dower, as that estate is cast upon her by act of law, and not as a purchaser; *Warner v. Van Alstyne*; *Wilson, &c. v. Davisson*, 2 Robinson's Virginia, 385, 404; *Ellicott v. Welch*, 2 Bland, 243, 244; see also *Nazareth Lit. & Benevo. Inst. v. Lowe & Wife*, 1 B. Monroe, 257, 258: against a voluntary donee; *Upshaw et ux. v. Hargrove*, 6 Smedes & Marshall, 286, 292: and against a purchaser for value, with notice, actual or constructive, on the face of the deed, or *aliunde*, that the purchase-money is unpaid; *Wilcox v. Calloway*, 1 Washington's Virginia, 38; *Graves v. McCall*, 1 Call, 414; *Redford v. Gibson*, 12 Leigh, 332, 347; *Pierce v. Gates*, 7 Blackford, 162; *Brumfield v. Palmer*, Id. 227, 230; *Mounce v. Byars*, 11 Georgia, 180; *Thornton, &c. v. Knox's Ex'r*, 6 B. Monroe, 74; *Honore's Ex'r v. Bakewell*, Id. 67; *Tiernan v. Thurman*, 14 Id. 279; *Eskridge v. M'Clure & Walker*, 2 Yerger, 84, 86; *Sheratz v. Nicodemus*, 7 Id. 9, 11; *M'Knight & Brady v. Bright*, 2 Missouri, 110; *Briscoe v. Bronaugh*, 1 Texas, 326, 330, 332; *Wright v. Woodland and Wife et al.*, 10 Gill & Johnson, 388; (see also, *Ghiselin & Worthington v. Ferguson*, 4 Harris & Johnson, 522,

525;) and, in general, against all not appearing clearly to be purchasers for value without notice; *High & Wife v. Batte*, 10 Yerger, 186, 335; *Mounce v. Byers*, 16 Georgia, 469; *Burlingame v. Robbins*, 21 Barbour, 327; who have actually paid their purchase-money; *Ripperdon v. Cozine, &c.*, 8 B. Monroe, 465, 466; but not against those who are *bona fide* purchasers without notice; *Blight's Heirs v. Banks, &c.*, 6 Monroe, 192, 198; *Taylor v. Hunter & Searcy*, 5 Humphreys, 569, 570; *Stewart et al. v. Ives et al.*, 1 Smedes & Marshall, 197, 206; *Carnes v. Hubbard et al.*, 2 Id. 108, 113; *Dunlap v. Burnett et al.*, 5 Id. 702, 710; *Work v. Brayton*, 5 Indiana, 396; *Coster v. The Bank of Georgia*, 24 Alabama, 37; *Bradford v. Harper*, 25 Id. 337; *Webb v. Robinson*, 14 Georgia, 216; dictum in *Bayley v. Greenleaf*, 7 Wheaton, 46, 50. Notice to the agent of the purchase, will, as in other cases, operate as notice to the principal; *Mounce v. Byers*, 11 Georgia, 180; and in *Ringgold v. Bryan*, 3 Maryland Ch. 488, the possession of the vendor was said to be notice of his lien to a subsequent purchaser from the vendee.

In regard to the existence of this lien as against creditors, the cases are somewhat at variance. It appears to be agreed that it does not prevail against a *bona fide* mortgagee without notice, who in fact is regarded in equity as a purchaser; *Duval v. Bibb*, 4 Henning & Munford, 113, 120; *Wood v. Bank of Kentucky, &c.*, 5 Monroe, 194, 195; *Clark v. Hunt*, 3 J. J. Marshall, 553, 557; *Growning & Co. v. Behn, &c.*, 10 B. Monroe, 383, 385; though it was held that it would prevail against a mortgagee with notice, (Bibb, C. J., dissenting.)

in *Eubank v. Poston, &c.*, 5 Monroe, 285, 291, 313. In *Bayley v. Greenleaf*, 7 Wheaton, 46, it was decided, that it will not be enforced against a conveyance to creditors in consideration of antecedent debts; and strong considerations were presented in opposition to its prevailing against judgment creditors, or creditors under any circumstances. In *Moore et al v. Holcombe et al.*, 3 Leigh, 597, 600, these views were approved, and it was decided that if one sold land without payment or security, and the vendee resold, and took bonds, and assigned those bonds for value and without notice, the first vendor's lien would be postponed to the assignee of the bonds. In Georgia, creditors will not be postponed to a lien for unpaid purchase-money, unless they become such with notice of its existence; *Webb v. Robinson*, 14 Georgia, 216. In Mississippi, it has been held, that it cannot prevail against creditors claiming under a deed of trust made for their benefit, or under a mortgage, for they have more than an equity or lien, they have the legal title; *Dunlap v. Burnett et al.*, 5 Smedes & Marshall, 702, 710. In North Carolina, before the lien was rejected entirely, it had been decided that it was subordinate to the rights of judgment creditors, and purchasers at their sale; *Johnson v. Cawthorn*, 1 Devereux & Battle, 32, 35; *Harper v. Williams*, Id. 379: "If a vendor claiming such a lien," said Gaston, J., in the former of these cases, "will not reduce it to a legal form, and give it the notoriety of registration, which our laws require for the validity of legal liens, it cannot prevail against creditors." In Tennessee, it is settled, that the vendor's lien will not be sustained against judgment cre-

ditors or purchasers at their sale; *Roberts v. Rose et al.*, 2 Humphreys, 145, 147; nor against creditors who receive a mortgage to indemnify them against previous liabilities, and Catron, C. J., said, of *Bayley v. Greenfield*, "this decision meets the most decided and unanimous approbation of this court;" *Gann v. Chester*, 5 Yerger, 205, 209; but that it will prevail against a voluntary assignment for the benefit of creditors, where a bill is filed by the vendor, before the trust is executed; *Brown v. Vanlier et als.*, 7 Humphreys, 239, 249. In New York, also, it was held by the Vice-Chancellor that the vendor's lien will prevail against a voluntary assignment to a trustee for the benefit of antecedent creditors; *Shirley v. Sugar Refinery*, 2 Edwards, 505, 508; see also *Repp et al. v. Repp, Warfield & Fox*, 12 Gill & Johnson, 341, 352: and in Indiana and Maryland, *Ringgold v. Bryan*, 3 Maryland Ch. 488, the lien prevails against judgment creditors; *Aldridge v. Dunn*, 7 Black. 249, 250. The decisions are, therefore, in conflict: but in respect to the justice and policy of postponing this equitable lien to the rights of creditors, the reasoning of Marshall, C. J., in *Bayley v. Greenleaf*, is unanswerable. "To the world," says the Chief Justice, "the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him in the confidence that the property is his own in equity, as well as at law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on

which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bona fide* creditors. The lien of the vendor, if in the nature of a trust, is a secret trust; and, although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage.

. . . In the United States, the claims of creditors stand on high ground. There is not perhaps a State in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors as well as subsequent purchasers without notice."

In order to determine whether a vendor's claim for unpaid purchase-money is of a character to prevail over the rights of subsequent creditors, it is necessary to examine, somewhat more closely, the origin and nature of this, so called, "equitable lien." It is difficult, from the American authorities, to derive a satisfactory notion upon the subject. The neglect in many of the courts to distinguish, carefully, between the implied equity, where the title has been absolutely conveyed, and the lien existing where the title is retained by the vendor, and only a title-bond given to the purchaser, has increased the confusion, and led to much inaccuracy. See *Anthony v. Smith*, 9 Humphreys, 508, 511. In some of the states, the "vendor's lien" has come to be considered as in the nature of an equitable mortgage: see the Kentucky decisions,

and the remarks of Baldwin, J., in *Wilson, &c. v. Davisson*, 2 Robinson's Virginia, 385, 404, who speaks of it, "as a kind of equitable mortgage, inherent in the contract of sale, and qualifying the ownership of the vendee:" by other tribunals, it has been regarded as a trust, incident, uniformly and necessarily, in equity, to all conveyances where the purchase-money is not paid; *Ringgold v. Bryan*, 3 Maryland Ch. 488: see the views of Bland, C., in *Moreton v. Harrison*, 1 Bland, 491, and in *Iglehart v. Armiger*, Id. 519, 524, 525. It is believed, that both of these theories are unsound, and that this claim is neither an equitable mortgage nor a trust. An equitable mortgage springs from an agreement, express or implied, of the parties, that there shall be a lien: but this claim, though the question of its waiver may be a matter in agreement and intention, is in its inception and essence, a simple equity, raised and given by the court, and not created by the intention or contract of the vendor and vendee. It seems to be equally clear that it is not a trust. Upon a ready money sale, if a conveyance be made in advance of payment, there is no doubt that the vendee is a trustee for the purchase-money; but whether, when credit is expressly given for the purchase-money, and a note payable *in futuro*, is taken upon the conveyance, the land, in the hands of the vendee, is affected with a trust for the satisfaction of that debt, is a different question. There are but two grounds upon which equity raises a trust; one, the agreement or intention of the parties, the other, the fraud, or breach of faith or duty, of the person who thereby is made a trustee. No agreement for a security on the land

can be inferred when the parties expressly decline making such an agreement; and it is admitted that this claim does not arise from agreement. Where it is a part of the contract that a note or bond is to be given for the purchase-money, no trust, *ex malificio*, can arise at the time of the conveyance, for the vendee is acting strictly within his duty; and none can be created from the mere non-payment of the debt, when it becomes due, for that is not such a fraud as equity makes the ground of a trust. The case presents none of the elements of a trust in land. The circumstances, that the vendor's claim is not such an interest as he can assign, and that he cannot charge the land until he has exhausted his legal remedies against the personal estate, which the best authorities agree in, indicate, unmistakably, that this is neither an equitable mortgage, nor a trust. The true nature of the claim appears to be this. It had its origin in a country where lands were not liable, both during and after the life of the debtor, for all personal obligations, indiscriminately, including debts by simple contract: and it seems to be an original and natural equity, that the creditor whose debt was the consideration of the land, should, by virtue of that consideration, be allowed to charge the land upon failure of the personal assets. It is not a lien until a bill has been filed to assert it: before that is done, it is a mere equity or capacity to acquire a lien, and to have a satisfaction of it. When a bill is filed, it becomes a specific lien. This equity no doubt dates back to the time of the conveyance, and to the origin of the debt. As soon as the debt for purchase-money exists, though to be paid *in futuro*, the

equity to come upon the land, attaches to it. Therefore, it prevails against dower, and all other estates which the law considers as in privity with that of the vendee; it prevails against all who take with notice, actual or legal, for all such persons are considered as standing in the situation of the vendee. In such cases the dispute is between the vendor, on the one hand, and the vendee and his representatives, on the other. But when subsequent lien creditors intervene, the contest is no longer between the vendor and vendee; it is between third persons contending for his estate. It depends no longer on the equity of one party as against the vendee and those in privity with him; it depends upon the relative equities and rights of the disputants, in a comparison with one another. If this be a correct view of the nature of the vendor's claim, the question is at an end. Lien creditors will supplant one, who, though he had a right in equity to charge the land, through his own laches and default, failed to secure a lien. Lien creditors are entitled to the whole estate of their debtor, subject only to prior specific liens, legal or equitable; if the vendor's equity be neither a specific lien, nor a trust qualifying the estate in equity, the right of lien creditors is paramount to it. The principle then is, that, the vendor's equity, though prevailing against the vendee and all claiming through him, is subordinate to the rights of subsequent lien creditors, with or without notice. It then only remains to determine who are lien creditors. Judgment creditors, mortgagees with or without notice, creditors receiving a conveyance directly to themselves, of course, are: in the case of a voluntary

assignment to a trustee for the benefit of creditors, the difficulty is to determine when the creditors become lien creditors by virtue of the assignment. Before they have elected to take under the deed, the assignee is rather the trustee for the debtor than for them; when they have accepted the assignment, by claiming or taking a benefit under it, the assignee becomes their trustee, and they assume, by virtue of the assignment, the character of lien creditors. The decision in Tennessee, above referred to, that the vendor's equity will over-ride a voluntary assignment to a trustee, if asserted before anything has been done in execution of the trust, appears, therefore, to be strictly correct: but there can be little doubt, that if the creditors have filed a bill to have the trust under the assignment executed, or have otherwise made themselves parties to the assignment by claiming or receiving a benefit under it, they would prevail over the tardy claim of the vendor.

If there be a difficulty in defining, with precision, the nature of this creditor's equity, there seems to be little doubt, that it is something less firm, distinct, and positive, than the lien of a creditor by mortgage, judgment, or bill filed. *Trotter v. Erwin*, 27 Miss. 772. "The lien of a vendor for the purchase-money," says Story, J., in *Gilman v. Brown et al.*, 1 Mason, 192, 221, "is not of so high and stringent a nature, as that of a judgment creditor, for the latter binds the land according to the course of the common law; whereas the former is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence, until it is established by the decree of

a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although sometimes that appellation is loosely applied to it." Whatever may be its name or nature, it seems to be reasonable, that when a man claims an equity, not under any agreement, but in direct opposition to his own express and solemn acknowledgment, intended to be put on record and made known to all the world, he ought not to be allowed to enforce it against persons who may have given credit and incurred risk on the faith of that acknowledgment.

If the views above stated be sound,

there can be little doubt that this principle, of an implied lien for purchase-money, has no just application in a country where every debt may be at once made a lien by a judgment, and where debts generally are a lien on the lands of decedents; and that the courts of those states, which have wholly expelled the doctrine, have exhibited a more accurate appreciation of its nature and purpose, than those which have retained it.

The vendor of personal property has no implied or equitable lien for the purchase-money, after parting with the possession, but must look to the personal responsibility, only, of the vendee; *James v. Bird's Adm'r*, 8 Leigh, 510, 513; *Beam v. Blanton*, 3 Iredell's Equity, 59, 62; *Lupin v. Marie*, 6 Wendell, 77, 82.

ELECTION.

*NOYS v. MORDAUNT.

[*271]

DE TERM. S. HIL., FEB. 4, 1706.

REPORTED 2 VERN. 581.¹

ELECTION.]—*A. having two daughters, B. and C., devises fee-simple lands to B., and lands which were settled upon him in tail to C. If B. will claim a share of the entailed lands under the settlement, she must quit the fee-simple lands; for the testator having disposed of the whole of his estate amongst his children, what he gave them was upon the implied condition they should release to each other.*

JOHN EVERARD, having two daughters, in 1686 makes his will, and devises to Margaret, his eldest daughter, his lands in Beeston, and £800 in money; to Mary, his second daughter, his lands in Stanborn and Broom, and £1300 in money, provided and on condition she released, conveyed, and assured Beeston lands to her sister Margaret; and devised to his said second daughter

¹ S. C., Eq. Ca. Ab. 273, pl. 3; Prec. Ch. 265; Gilb. Eq. Rep. 2.

£1300 in money.¹ Provided, if he should have a son, what was devised to his daughters to be void; and, in such case, gave to Margaret £1200, and to Mary £1000. Provided, if he should have another daughter, then he gave the £800 devised to Margaret to such after-born daughter; and the lands at Stanborn and Broom, and the £1300 devised to Mary, the second daughter, to the said Mary and such after-born daughter, equally between them.

He shortly afterwards died, and left his wife enceinte of a daughter, Elizabeth. Mary married Higgs, and died without issue, not having given any release to Margaret, her sister, according to the will.

[*272] Elizabeth claimed not only the lands devised to her by *the will, and a moiety of what was devised to her sister Mary, but also a moiety of the Beeston lands, devised to Margaret: the same, on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and, in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will, or renounce any benefit thereby.

LORD KEEPER COWPER.—In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands entailed or under settlement,² it is upon an *implied condition* that each party acquit and release the other; especially as in this case, where, plainly, he had the distribution of his whole estate under his consideration, and has given much more to Elizabeth than what belonged to her by the settlement, and had it in his power to cut off the entail.

[*273] *STREATFIELD v. STREATFIELD.

DE TERM. S. HIL., 1735.

REPORTED CAS. TEMP. TALB. 176.

ELECTION.]—*The ancestor, by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage in the usual manner. He makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son settles other lands, in consideration of this last marriage, in the usual manner, and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees,*

¹ This last bequest of £1300 in money seems to be a repetition of the first bequest of that sum with the lands in Stanborn and Broom.

² That is to say entailed or settled upon the one to whom the fee-simple lands are given, or upon such one jointly with the other.

to the use of his grandson for life, with usual remainders ; and with direction, out of the profits to educate the grandson, and to place out the rest of the profits to be paid to the grandson at twenty-one years of age ; and if he does not attain that age, to be paid to his said daughters, their executors, &c. The grandson is not to be bound by the deed, which did not pursue the articles, but then he shall make his election when he comes of age, and if he chooses to take lands which ought to have been settled, the daughters (his aunts) shall be reprimed out of the lands devised to him.

THOMAS STREATFIELD, the plaintiff's grandfather, by articles previous to his marriage, May 31st, 1677, agreed to settle lands in Sevenoake [in the county of Kent] to the use of himself and Martha, his intended wife, for their lives and the life of the survivor ; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas on his wife begotten, with other remainders over.

*The marriage soon after took effect, and by deed, dated April 5th, [*274] 1698, reciting the foresaid articles, he settled his lands at Sevenoake to the use of himself and his wife for their lives, and the life of the longest liver of them without impeachment of waste during the life of Thomas, and after their decease, to the use of the heirs of the body of the said Thomas, on the said Martha to be begotten ; and for want of such issue, remainder to the right heirs of Thomas. They had issue, Thomas (their only son,) and two daughters, Margaret and Martha.

In the year 1716, upon the marriage of Thomas, the son, the father settled other lands (of which he was seised in fee,) of the yearly value of £355, to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise £2000 for younger children.

After the son's death, [leaving a son called Thomas,] Thomas, the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee, and in the year 1725 made his will, and thereby devised part of those lands¹ to his two daughter, Margaret and Martha ; "And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversion, or remainder, not therein before given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees, in trust for the plaintiff Thomas, his grandson, for life ; remainder to his first and other sons in tail male ; remainder to his daughters in tail ; remainder to Margaret and Martha, with several remainders over." Then comes this clause. "And my will and meaning farther is, and I do hereby authorize and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson Thomas, so much as they shall think fit during his minority ; and that the trustees shall place out at interest such moneys arising out of the rents and profits of the said estates ; which said moneys, with interest arising therefrom, my will is, *be paid to my grandson Thomas [*275] at his age of twenty-one years, if he so long live ; or, in case he dies

¹ i. e. viz., the lands at Sevenoake in Kent.

before that age, then that the same shall be paid to my two daughters, Margaret and Martha, their executors," &c.

The testator died in the year 1730.

The question was, whether the settlement in 1698 was a proper execution of the articles of 1677? and if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677?

Mr. *Solicitor-General*, Mr. *Brown*, Mr. *Fazakerley*, and Mr. *Noel* argued, for the plaintiff, that, although in a will or articles executed, Thomas the grandfather would have been tenant in tail, yet the articles of 1677 being but executory, this Court would interpose, by carrying them into execution in the strictest manner, and not leaving it in his power to destroy the uses as soon as raised. That, according to that rule, the deed of 1698 was certainly no execution of the articles in equity; for, though it was in the very words, yet did it not at all answer the intent of the articles, and came, therefore, within the rules of *Trevor* and *Trevor's case*, 1 Eq. Ca. Abr. 387.¹

That the settlement in 1716, upon Thomas the son's marriage (although it was of lands of greater value than those contained in the articles,) could never be thought a satisfaction for them, there being no reference at all in it to the articles, and it being made only in consideration of the son's marriage, and for settling a jointure upon his wife, and making a competent provision for the issue; all which are new considerations, no way relative to the articles: and where there is an express consideration mentioned in a deed, there can be no averment of another not contained therein.²

That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done, was held in *Lechmere* and *Lady Lechmere's case*.³ But, in this case, Thomas the son was, by the articles, to have been tenant in tail; but, by the settlement in 1716, he was to be but tenant for life: which was giving him a *less estate for a greater, and [*276] consequently not to be deemed a satisfaction without a special acceptance of it as such, according to the rule in *Pinnel's case*, 5 Co. 117, where it is held that payment of a lesser sum can never be a satisfaction for a greater, unless upon a special circumstance showing the intent, as payment at an earlier day, &c. That the will could no more be taken for a satisfaction than the settlement, and upon the same reasons; for, by it, the plaintiff is no more than tenant for life, and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one, and then to be paid to him; but if he dies before that age, they are given away to the testator's daughters; and when he does arrive to that age, he is to be but barely tenant for life, and even not that without impeachment of waste; besides, if the will be construed a satisfaction, as against the plaintiff, so it must likewise be as to all the others claiming under the articles; whereas, the plaintiff's sisters, who were entitled under the articles, can never take anything under this will, but are wholly excluded.

¹ 1 P. Wms. 622, S. C.

² Dyer, 146, p. 71.

³ *Lechmere v. Lechmere*, Ca. t. Talb. 80; S. C., 3. P. Wms. 211.

The general devise of all his manors, lands, &c., *in possession, reversion, or remainder*, will not alter the case; for, where the testator hath estate sufficient to satisfy such general words, he shall never be construed to have intended to pass that which he had no right to dispose of, and the giving of which would work a wrong. That he had no right to dispose of the lands contained in the articles, is evident from what hath been already said; and had not this been upon his own marriage, but in any other settlement, he had been a trustee for his son, and then had made his will in the same words that he hath done here, surely that trust estate would never have passed; and there is no difference, whether the trust be expressed, or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. *A grant of all one's goods* will not pass those which he hath in *auter droit*: So, if he had had a mortgage in fee, such general words would not have passed *it from the devisee of the personal estate to the devisee of the land. In *Rose and Bartlett's case*, Cro. Car. 292, a general devise [*277] of *all his lands and tenements*, having both freehold and leasehold, was held to pass the freehold lands only.¹ And, in *Harwood and Child's case*, heard by the present Lord Chancellor, March 18, 1734, a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can the cases of *Duffield v. Smith*, 2 Vern. 250; *Noys v. Mordaunt*, 2 Vern. 581, be objected; for, in the former the decree was reversed, upon account of the sister's being heir-at-law, and disinherited, which is the present case: (for here they would take a beneficial interest from the plaintiff, who was heir-at-law to his grandfather, and give him but a very small one in its room;) and in the latter case, the father, being tenant in tail of part, had power to bar it by fine; in which respect he might well be looked upon as a proprietor of the whole; but, if he be decreed to make his election, it must be done presently, for then it is that he is to take; whereas, he cannot by law make his election, being but an infant; and if so, the Court must compel him to that which the law disables him from doing.

Mr. Attorney-General, Mr. Strange, and Mr. Peere Williams, argued for the defendant, that this Court will not, in all cases whatever, decree a specific performance; but would, in some particular cases, leave the party to his remedy at law upon the covenant; that these articles were made so long ago as in 1677, and Thomas, the son, who was the person entitled to have them carried into execution, lived until 1722, forty-five years after, without ever desiring to have them executed; and that the intent of those articles did not seem to go any farther than the settling the jointure on the wife, and the making Thomas, the grandfather, tenant in tail, the words being *to provide for the wife*, but no mention made of the issue; but, *whoever comes into equity must do equity*; and therefore, *if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which [*278]

¹ See now, 1 Vict. c. 26, s. 6.

gives him an estate upon a plain supposal that he shall take nothing by the articles ; but shall never be at liberty to take a great benefit under the will, and waive that part which makes against him to the prejudice of a third person. The whole will must be acquiesced under, or no part of it at all, according to the resolution in *Noys and Mordaunt's case*;¹ which went upon the reason of an entire compliance with the testator's intent in taking entirely under the will, and not upon the supposed reason of his being proprietor by having it in his power to levy a fine. The like resolution was in the case of *Hearne v. Hearne*, 2 Vern. 555, in that of *Cowper v. Cotton*, February 16, 1731,² at the Rolls : where a freeman of London devised his estate to trustees for the raising 6000*l.* for his four daughters, and made a disposition of the surplus, it was held that they should stand either by the will or by the custom ; and if by the former, that they should not defeat the devise over. That, in cases where general words in a will had been restrained from passing all which the testator had, it hath been upon the testator's intention manifestly appearing in the will itself, not to pass so much as the generality of his words would comprehend ; but, in the present case, his intent plainly appears to pass all : nor will that intent be satisfied by saying, that he had a reversion of the lands comprised in the articles, since he would have been tenant in tail under the articles, and only for life under the will.

LORD CHANCELLOR TALBOT.—It cannot be doubted but that, upon application to this Court for the carrying into execution the articles of 1677, the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing : and the nature of the provision is strong enough for this purpose, without any express words, and I must, therefore, consider what was the operation of the deed of 1698, which is declared to be in *performance
[*279] of the true intent and meaning of the articles. If it be so, all is well ; but if it be not, it only shows that the parties intended it so, but were mistaken. So was the case of *West v. Errissey*,³ where the articles were, by the House of Lords, decreed to be made good ; and the same must be done in this case, if nothing intervenes to prevent it.

The settlement, in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles ; but to me it appears neither an actual satisfaction nor to have been intended as such. The grandfather had done that in 1698, which he apprehended to be a satisfaction for the articles ; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new, the limitations being entirely different ; and, therefore, it would be absurd to call this a satisfaction for another thing it hath nothing to do with, and to which it is no way relative.

The next thing to be considered is, the fine levied of lands in question in

¹ Ante.

² *Cowper v. Scott*, 3 P. Wms. 123.

³ 2 P. Wms. 349 ; 1 Bro. P. C. 225 ; Toml. edit.

the year 1723, by the grandfather; the intent whereof was, to have the absolute ownership of those lands in him. And one reason why no application hath been made till now to have those articles carried into execution, might be that during the grandfather's life nobody was entitled to anything in possession under them.

Then comes the will in 1725, whereby he gives part of those lands, settled in 1698, to his daughters; thereby showing his apprehension to be, that, by a fine, he had given himself a power of disposing of them; and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson the plaintiff, upon his attaining the age of twenty-one; and the question here is, whether the general words shall ever pass lands not capable of the limitation *in the will? And to that have been cited *Rose and Bartlett's case*, Cro. [*280] Car. 292, and other cases; but they cannot influence the present case: for, the testator had legally a power to dispose of those lands; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conscience, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands*; for there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other; I, therefore, *think his intent was clear to pass these lands by the will*; and if so, we must now consider what will be the effect of this will.

If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases; *but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; as was done in Noys and Mordaunt's case; there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made.* So are the several cases that have been decreed upon the custom of London.

The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and if after, then but an estate for life; and that he appears before the Court in the favorable light of being heir-at-law; but this will not alter the case. The estates which the testator has given him were undoubtedly in his power; he hath given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir-at-law; and surely it is as much *in the power of the Court to make this bequest, thus limited, to be a [*281] satisfaction, if the party will stand to the will, as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles; but that is because nothing is left

them by the will; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement: nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, viz., nieces, at the same time that the mother, (who hath an ample provision,) would be left at large, and under no tie of maintaining her own children.

And so decreed the plaintiff to have six months after he comes of age, to make his election, whether he will stand to the will or the articles? And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to Margaret and Martha, to be conveyed to them in fee.

Noys v. Mordaunt, and *Streatfield v. Streatfield*, are printed together, since they are usually cited as having conclusively established the doctrine of election, which is founded upon the principle, that there is an implied condition, that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. See *Walpole v. Conway*, Barnard. Ch. Rep. 159; *Kirkham v. Smith*, 1 Ves. 258; *Macnamara v. Jones*, 1 Bro. C. C. 481; *Frank v. Standish*, 1 Bro. C. C. 588, n.; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Swan v. Holmes*, 19 Beav. 471; *Wintour v. Clifton*, 26 L. J. N. S., Ch., 218; 3 Jur. N. S. 74; and *Dillon v. Parker*, 1 Swanst. 359, and *Gretton v. Haward*, 1 Swanst. 409, and *Mr. Swanston's learned and elaborate notes to those cases.

[*282] To illustrate the doctrine of election, suppose A., by will or deed, gives to B. property belonging to C., and by the same instrument gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A. only, upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favor of B.; he must, consequently, make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument; if C. elects to take under, and consequently to conform with all the provisions of the instrument, no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.; but if C. elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A., an important question arises whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election.

¹ See the decree, 1 Swanst. 447; Reg. Lib. B., 1735, fol. 205.

There are many dicta in favor of the doctrine of forfeiture. See *Cowper v. Scott*, 3 P. Wms. 124; *Cookes v. Hellier*, 1 Ves. 235; *Morris v. Burroughs*, 1 Atk. 404; *Pugh v. Smith*, 2 Atk. 43; *Wilson v. Mount*, 3 Ves. 194; *Wilson v. Townshend*, 2 Ves. jun. 697; *Broome v. Monck*, 10 Ves. 609; *Thellusson v. Woodford*, 13 Ves. 220; *Villareal v. Lord Galway*, 1 Bro. C. C. 292, n.; *Green v. Green*, 2 Mer. 86; and see the decision of Lord Langdale, M. R., in *Greenwood v. Penny*, 12 Beav. 406; and the late Mr. Jacob, in a note to 1 Roper on Husband and Wife, 566, supports the doctrine of forfeiture. The same view is also taken by Sir Edward Sugden. See 2 Sugd. Pow. 145, 7th edit. The principal case, of *Streatfield v. Streatfield*, is a distinct authority for the doctrine of compensation. See also *Webster v. Milford*, 2 Eq. Ca. Ab. 363, marg.; *Bor v. Bor*, 3 Bro. P. C. Toml. ed. 167; *Ardesoife v. Bennet*, 2 Dick. 465; *Lewis v. King*, 2 Bro. C. C. 600; *Freke v. Barrington*, 3 Bro. C. C. 285; *Whistler v. Webster*, 2 Ves. jun. 372; *Ward v. Baugh*, 4 Ves. 627; *Lady Cavan v. Pulteney*, 2 Ves. jun. 560; *Blake v. Bunbury*, 1 Ves. jun. 523; *Welby v. Welby*, 2 V. & B. 190, 191; and Lord Eldon, in *Dashwood v. Peyton*, 18 Ves. 49; *Tibbits v. Tibbits*, Jac. 317; *Lord Ranchiffe v. Parkyns*, 6 Dow, 179; and *Ker v. Wauchope*, 1 Bligh. 25, clearly recognizes the principle of compensation, as applied to the doctrine of election. "In our Courts," observes his Lordship, in the latter case, "we have engrafted upon this primary doctrine of election, the equity, as *it may be termed, of compensation. Suppose a testator gives his estate to A., and directs [*283] that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the courts of equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." Nearly all these authorities are stated in Mr. Swanston's learned note to *Gretton v. Haward*, 1 Swanst. 433, and in his opinion they establish two propositions: "1st. That, in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2d. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right." See also *Padbury v. Clark*, 2 Mac. & G. 298; *Greenwood v. Penny*, 12 Beav. 403.

As the doctrine of election depends then upon compensation, it follows that it will not be applicable unless there be a fund from which compensation can be made. Thus it was held, by Lord Loughborough, C., in *Bristow v. Warde*, 2 Ves. jun. 336, that where, under a power to appoint to children, the father made an appointment improperly, any child entitled in default of appointment might set it aside, although a specific share was appointed to him. "The doctrine of election," said his Lordship, "never can be applied, but where if,

an election is made contrary to the will, the interest that would pass by the will can be laid hold of, to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." See *Banks v. Banks*, 17 Beav. 352.

It seems to be doubtful whether the doctrine of election applies to grants from the Crown, for the Crown is always in existence and can always be applied to, to set right the grant: per Sir T. Plumer, M. R., 2 J. & W. 345. Where however two persons A. and B. joined in a petition to the Crown, representing [*284] an estate to have escheated, and procured *a grant of it to be made to them, it was held by Sir T. Plumer, M. R., that the assignees of A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest. *Cumming v. Forrester*, 2 J. & W. 334.

The doctrine of election is applicable to deeds as well as to wills, (*Llewellyn v. Mackworth*, Barnard. Ch. Rep. 445; *Bigland v. Huddleston*, 3 Bro. C. C. 286, n.; *Moore v. Butler*, 2 S. & L. 266; *Birmingham v. Kirwan*, 2 S. & L. 450; *Green v. Green*, 2 Mer. 86; *Bacon v. Cosby*, 4 De G. & Sm. 261; *Cumming v. Forrester*, 2 J. & W. 345; *Anderson v. Abbot*, 5 W. R. 381, M. R.): although by the civil law, from which it appears to have been borrowed by our courts of equity, it was confined to wills. See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 394. And notwithstanding the opinion of Lord Hardwicke, in *Bor v. Bor*, 3 Bro. P. C. 178, n., Toml. ed., and the decision in *Stewart v. Henry*, Vern. & Scriv. 49, the doctrine of election is applicable to interests remote, contingent, or of small value, as well as to those which are immediate or of great value. *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Graves v. Forman*, cited 3 Ves. 67; *Highway v. Banner*, 1 Bro. C. C. 584; *Wilson v. Townsend*, 2 Ves. jun. 697; *Morgan v. Morgan*, 4 Ir. Ch. Rep. 606; *M^cQueen v. M^cQueen*, 2 Jones's Eq. (North Carolina R.) 16.

In order to raise a case of election, there must appear in the will or instrument itself a clear intention, on the part of the author of it, to dispose of that which is not his own: (*Forrester v. Cotton*, 1 Eden, 531; *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390; *Dashwood v. Peyton*, 18 Ves. 27; *Blake v. Bunbury*, 4 Bro. C. C. 21; S. C., 1 Ves. jun. 514; *Rancliffe v. Lady Parkyns*, 6 Dow, 149, 179; *Dillon v. Parker*, 1 Swanst. 359; S. C., Wils. 253; Jac. 505; 7 Bligh, N. S. 325; 1 C. & F. 303; Sugd. Prop. 450; *Jervoise v. Jervoise*, 17 Beav. 566; *Padbury v. Clark*, 2 Mac. & G. 298; *Lee v. Egremont*, 5 De G. & Sm. 348; *Wintour v. Clifton*, 21 Beav. 447, 26 L. J. N. S., Ch., 218; and see *Stephens v. Stone*, 5 W. R. 416, V. C. K.; S. C., nom. *Stephens v. Stephens*, 3 Jur. N. S. 525;) and it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; for, in either case, if the intention to dispose of it appears clearly, his disposition will be sufficient to raise a case of election: *Whistler v. Webster*, 2 Ves. jun. 370; *Thellusson v. Woodford*, 13 Ves. 221; *Welby v. Welby*, 2 V. & B. 199, overruling *Cull v. Showell*, Amb. 727. However, as observed by Lord Eldon,

"it is difficult in any case to apply the doctrine of election where the testator has some present interest in the estate disposed of, though it may not be entirely his own:" *Lord Rancliffe v. Lady Parkyns*, 6 Dow, 185.

*It was at one time supposed that parol evidence, dehors the will, was admissible for the purpose of showing that a testator considering [*285] property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. See *Pulteney v. Lord Darlington*, referred to in 2 Ves. jun. 544; 3 Ves. 384, 521, 529; 6 Ves. 314, 322, 391, 399, 402, in which case rent-rolls and stewards' accounts, agreements of solicitors, cases and opinions of counsel, and all sorts of papers, were admitted to be read, to prove that the testator dealt with property of which he was tenant in tail, as absolute owner, and that he intended to comprise it in a general devise; so that the heir in tail, who took other benefits under the will, was compelled to elect, although the testator had large real estates to satisfy the words of the devise. See also *Finch v. Finch*, 4 Bro. C. C. 38; S. C., 1 Ves. jun. 534; *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Rutter v. Maclean*, 4 Ves. 531; *Pole v. Lord Somers*, 6 Ves. 309; *Druce v. Denison*, 6 Ves. 385. Lord Commissioner Eyre, however, in *Blake v. Bunbury*, 1 Ves. jun. 523, says, "that the intent of the testator to dispose of that which is not his, ought to appear upon the will;" and in *Stratton v. Best*, 1 Ves. jun. 285, where a testator suffered a recovery of the whole of the manor, though he was only entitled to a part of it, and afterwards devised in general words all his real and personal estate to trustees, Lord Thurlow refused to admit evidence to show that the testator supposed himself entitled to the whole manor. "I admit," observed his Lordship, "you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole. I have no doubt but that, if he had been asked, when he made his will, whether he did not mean the whole, he would have said yes; and if desired to put in a description of it, he would have done so: that I believe, upon the evidence you have brought. But to do this I must say that evidence, dehors the will, of the testator's opinion at any time, may be produced: and I do not think that is the law of the Court. All the argument in *Noys v. Mordaunt*, and the whole suite of cases upon this subject, have turned upon the expressions of the will. If I was to receive evidence of the testator's fancy, I should introduce a very desperate rule of property in this Court." Lord Rosslyn, in the case of *Rutter v. Maclean*, 4 Ves. 537, expressed himself dissatisfied with *Pulteney v. Darlington*, as did also Lord Eldon, in *Pole v. Somers*, 6 Ves. 322; and in *Druce v. Denison*, 6 Ves. 402, where he observed that he agreed with Lord Rosslyn, and that he could not see upon what principle the evidence was admitted in that case. See also **Doe v. Chichester*, 4 Dow, 76, 89, 90, and the case of *Clementson v. Gandy*, 1 Kee. 309, where parol evidence was tendered for [*286] the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election. However, Lord Langdale, M. R., refused to admit the evidence. "I am of opinion," observed his Lordship, "that this evidence

cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she intended; and it is argued that this raises a case of election. The intention to dispose must in all cases appear by the will alone. In cases which require it, the Court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood." See also *Blommart v. Player*, 2 S. & S. 597; *Dummer v. Pitcher*, 2 My. & K. 262; *Crabb v. Crabb*, 1 My. & K. 511; 5 Sim. 35; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Allen v. Anderson*, 5 Hare, 163.

Although, under the old law, a devise to the heir was in a certain sense inoperative, as he took by *descent* as heir, and not by purchase as devisee, it has been held, ever since the decision of *Noys v. Mordaunt*, to be a sufficient gift to him of the testator's property to raise a case of election, should the testator devise or bequeath to another, property belonging to the heir. "That an heir," observes Sir W. Grant, M. R., "to whom an estate is devised in fee, may be put to an election, although by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord Cowper's decision in the case in *Gilbert*; for if the will is in other respects so framed as to raise a case of election, then not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So that the devise is read as if it were to the heir absolutely, if he confirm the will; *if not, then in trust for [*287] the disappointed devisees as to so much of the estate, given to him, as shall be equal in value to the estates intended for them: *Welby v. Welby*, 2 V. & B. 190; *Anon.*, Gilb. 15; *Thellusson v. Woodford*, 13 Ves. 209; S. C., 1 Dow, 249, nom. *Rendlesham v. Woodford*; a fortiori will the heir now be put to his election, since, by a recent statute, where lands are devised by the will of a testator dying after the 31st of December, 1833, to the heir, he will take as devisee by purchase, and not by descent; see 3 & 4 Will. 4, c. 106, s. 3; and *Schroder v. Schroder*, Kay, 578.

Merely precatory words, requesting appointees, objects of the power, to leave the fund appointed to others, not objects of the power, unless the words are construed as imperative, (*Moriarty v. Martin*, 3 Ir. Ch. Rep. 26,) will not raise a case of election. Thus in *Blacket v. Lamb*, 14 Beav. 482, a testator duly appointed a fund in favor of the objects of a power absolutely, and he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power. It was held that this did not raise a case of election. See also *Kampf v. Jones*, 2 Keen,

756; *Carver v. Bowles*, 2 Russ. & My. 301. Neither will the non-execution of a power upon an erroneous impression stated in the will, that by its non-execution one person who is a legatee will divide the fund equally with another: *Langslow v. Langslow*, 21 Beav. 552.

Where, however, an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election. Thus, where a man having a power to appoint to A. a fund, which in default of appointment is given to B., exercises the power in favor of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment, 2 Sug. Pow. 148. And see *Whistler v. Webster*, 2 Ves. jun. 267. "So where a person has power to appoint to two, and he appoints to one only, and gives a legacy to the other, that is a case of election:" 2 Sug. Pow. 148; *Wollen v. Tanner*, 5 Ves. 218; *Vane v. Lord Dungannon*, 2 S. & L. 118. So where a person having a power to appoint, delegates the power (which he has really no right to do) to another, and by the same instrument confers benefits upon the objects of the power, they cannot retain the benefits given to them by the will and also claim the property against the execution of the power so improperly delegated: *Ingram v. Ingram*, cited 1 Ves. 259.

*No case of election will be raised, where there is a want of capacity to devise real estate by reason of infancy. Thus, under the old [*288] law, where an infant, whose will was valid as to personal, but invalid as to real estate, gave a legacy to his heir-at-law, and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise; he might take both: *Hearle v. Greenbank*, 3 Atk. 695, 715; 1 Ves. 298.

Nor will a case of election be raised if there is a want of capacity to bequeath arising from coverture. Thus, where a feme covert made a valid appointment by will to her husband, under a power, and also bequeathed to another personal estate, to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit conferred upon him by the power, and also to the property bequeathed by his wife, to which he was entitled jure mariti: *Rich v. Cockell*, 9 Ves. 369. With regard to infants, however, it must be remembered, that the Wills Act, 1 Vict. c. 26, s. 7, renders them incapable of making a will even of personalty.

Previous to the Wills Act, 1 Vict. c. 26, where a testator by a will, not properly attested for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from his heir, and gave him a legacy, the question has arisen, whether the heir-at-law was not obliged to elect between the freehold estate which descended to him in consequence of the devise being inoperative, and the legacy; it is clearly settled that he would not be obliged to elect, (*Sheddon v. Goodrich*, 8 Ves. 481; *Gardiner v. Fell*, 1 J. & W. 22; *Wilson v. Wilson*, 1 De G. & Sm. 152;) unless the legacy was given to him

with an express condition, that if he disputed, or did not comply with the whole of the will, he should forfeit all benefit under it: *Boughton v. Boughton*, 2 Ves. 12. "Lord Kenyon said, the distinction was settled, and not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will, under an express condition to give up a real estate by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, as he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke has adjudged, that if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless, according to an express condition, the legacy was given, so that the testator said expressly the legatee should not take unless that condition were complied with, *it was not a case of election. The [*289] reason of that distinction, if it were *res integra*, is questionable." Per Lord Eldon, in *Sheddon v. Goodrich*, 8 Ves. 496. See also *Brodie v. Barry*, 2 V. & B. 130.

These questions will not arise under wills coming within the Wills Act, because if they are sufficiently attested for the bequest of a personal legacy, they will also pass freehold estates.

This Act also puts an end (as far as regards wills coming within its operation) to questions which sometimes arose upon the testator attempting to dispose of real estate to which he might become entitled subsequent to the making of his will. The rule in such cases was, that if the testator showed a clear intention of disposing of after-acquired estates, the heir was obliged to elect between the after-acquired estates which would descend to him, and any benefits given him by the will; (*Thellusson v. Woodford*, 13 Ves. 209; S. C., *Rendlesham v. Woodford*, 1 Dow, 249; *Churchman v. Ireland*, 4 Sim. 520; 1 Russ. & My. 250; *Greenwood v. Penny*, 12 Beav. 403; *Schroder v. Schroder*, Kay, 578;) but not if the intention of the testator to dispose of the after-acquired estates was equivocal: *Back v. Kett*, Jac. 534. But here, again, the law has been altered by 1 Vict. c. 26, s. 24, which enacts, "That every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Previous to 55 Geo. 3, c. 192, (which rendered a surrender of copyholds to the use of wills unnecessary for the future,) it was held, that the heir to whom copyholds descended, in consequence of their not having been surrendered to the use of a will, was obliged to elect between the copyholds and any benefit he may have taken under the will. See *Unett v. Wilkes*, Amb. 430; 2 Eden, 187; *Rumbold v. Rumbold*, 3 Ves. 65; *Pettward v. Prescott*, 7 Ves. 541; but in *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390, the heir was not compelled to elect, because the testator, having freeholds as well as copyholds, was held not to have sufficiently indicated his intention to pass the copyholds by a mere general devise of all his real estate.

The heir of heritable property in Scotland, becoming entitled to it in con-

sequence of the will by which it is devised to another, not being conformable to the solemnities required by the law of Scotland, and taking also under the same will real or personal property in this country, will be compelled to elect between the heritable property which has descended to him as heir, and the benefits given to him by the will: *Brodie v. Barry*, 2 V. & B. 127; *M'Call v. M'Call*, *1 Dru. 283; secus, if it does not appear clearly that the testator intended to pass his Scotch estates: *Johnson v. Telford*, 1 [*290] Russ. & My. 244; *Allen v. Anderson*, 5 Hare, 163; *Maxwell v. Maxwell*, 16 Beav. 106; 2 De G. Mac. & G. 705; *Lamb v. Lamb*, 5 W. R. 720.

A widow may be put to her election between her dower and a gift conferred upon her, either by express words, (*Gosling v. Warburton*, Cro. Eliz. 128; *Lacy v. Anderson*, Choice Cases in Chancery, 155; *Boynnton v. Boynnton*, 1 Bro. C. C. 445; see *Dyke v. Rendall*, 2 De G. Mac. & G. 209; *Nottley v. Palmer*, 2 Drew. 93,) or by manifest implication, demonstrating the intention of the donor to exclude her from her legal right to dower. "If," observes Lord Redesdale, "there be anything ambiguous or doubtful,—if the Court cannot say that it was clearly the intention to exclude,—then the averment that the gift was made in lieu of dower cannot be supported: and, to make a case of election, that is necessary; for a gift is to be taken as pure, until a condition appear. . . . The only question made in all the cases is, whether an intention, not expressed by apt words, could be collected from the terms of the instrument. The result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds." *Birmingham v. Kirwan*, 2 S. & L. 452. Where the widow is not in express terms excluded from her right to dower, a question arises, and it is one by no means free from difficulty, what is a gift inconsistent with her assertion of that right? It has been long since settled that a devise by a testator to his widow of part of the lands of which she is dowable, is not inconsistent with her claim to dower in the remainder; this was decided in the leading case of *Lawrence v. Lawrence*. There the testator devised part of his real estate to his wife during her widowhood, and devised the residue to trustees, in trust for other persons; and he bequeathed to his widow several specific and pecuniary legacies. It was held by Lord Keeper Wright, on appeal, reversing the decision of Lord Somers, and afterwards by Lord Cowper and the House of Lords, affirming the decision of Lord Keeper Wright, that the widow was not obliged to elect between her dower and the benefits derived under the will, and that she was entitled to both: 2 Vern. 365; 2 Freem. 234, 235; 3 Bro. P. C. 483, Toml. ed. See also *Lemon v. Lemon*, 8 Vin. Abr., "Devise," p. 366, pl. 45; *French v. Davies*, 2 Ves. jun. 572; *Strahan v. Sutton*, 3 Ves. 249; *Lord Dorchester v. Earl of Effingham*, Coop. 319; *Brown v. Parry*, 2 Dick. 685; *Incedon v. Northcote*, 3 Atk. 430, 436; and *Gibson v. Gibson*, 1 Drew. 42.

*A devise of lands, out of which the widow is dowable, upon trust for sale, is not inconsistent with her claim to dower out of those lands, [*291] even although the interest of a part of the proceeds of the sale is given to her.

Thus, in *Ellis v. Lewis*, 3 Hare, 310, a testator devised all his real estate to a trustee upon trust for sale, with power to convey the same to purchasers, without the concurrence of any person or persons beneficially claiming under his will; and he directed the trustee to stand possessed of the proceeds of such sale, together with the residue of his personal estate, upon trust to pay one moiety of the interest and dividends thereof to his wife during her widowhood, and the other moiety of such interest and dividends (and the whole after his wife's decease or second marriage) to his sister for her life, with remainder as to the whole of the trust funds to the children of the testator's sister for their lives and the life of the survivor; remainder over. It was held by Sir James Wigram, V. C., that the widow was entitled both to her dower and to the benefit given to her by the will. "I take the law," observed his Honor, "to be clearly settled at this day, that a devise of lands *eo nomine* upon trust for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express any intention to devise the lands otherwise than subject to its legal incidents, that of dower included. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower by metes and bounds, or the devise standing alone will be construed as I have stated. The case of *French v. Davies*, 2 Vcs. jun. 572, is a direct authority for this proposition; and the current of the authorities which are collected in the last edition of Roper's Husband and Wife, vol. i., p. 577, beginning with the leading case of *Lawrence v. Lawrence*, down to *Dowson v. Bell*, 1 Kee. 761, confirm it. If that be so, it is impossible, in the case of a devise of lands upon trusts for sale, that any direction for the application of the proceeds of such sale can affect the case. The devise is of land subject to dower. The trust to sell is a trust to sell subject to dower; and the proceeds of the sale will represent the gross value of the estate, minus the value of the dower. Whatever direction, therefore, for the mere distribution of the proceeds the will may contain, that direction must leave the widow's right to dower untouched. . . . I found myself upon these two propositions: first, that a devise of land upon trusts for sale does not, *per se*, import an intention to pass the land otherwise than subject to the legal incident of dower; and, secondly, that the direction to divide the proceeds of the sale cannot decide what the subject of sale is; and there is no

[*292] circumstance *affecting the proposition in its application to the present case." See *Gibson v. Gibson*, 1 Drew. 42. It is immaterial, when there is a trust for sale, that there is a direction that the rents and profits are in the meantime to be applied in the same way as the income to arise from the produce of the sale: *Ib.* 57. See also *Bending v. Bending*, 3 K. & J. 257.

The gift by the husband of an annuity or rent-charge to the widow, charged upon the property out of which she is at law entitled to dower, is not inconsistent with her claim to dower, and will not consequently of itself alone put her to her election between the annuity or rent-charge and dower. See *Pitts v. Snowden*, 1 Bro. C. C. 292, n.; *Pearson v. Pearson*, 1 Bro. C. C. 291; *Foster v. Cook*, 3 Bro. C. C. 347; *Dowson v. Bell*, 1 Kee. 761; *Harrison v. Harrison*, 1 Kee. 765; and *Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Norcott v. Gordon*, 14 Sim. 258, overruling *Arnold v. Kempstead*, Amb. 466; S. C.,

2 Eden, 236; *Jones v. Collier*, Amb. 730; and *Wake v. Wake*, 3 Bro. C. C. 255; S. C., 1 Ves. jun. 335. The case of *Villa Real v. Lord Galway*, 1 Bro. C. C. 292; n., though sometimes cited as an authority for the proposition, that a widow will be put to her election by the mere gift of a rent-charge or annuity out of the lands of which she is dowable, was decided, it seems, upon the ground that certain directions in the will as to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of a child, were inconsistent with the setting out a third part of the estate by metes and bounds. See *Birmingham v. Kirwan*, 2 S. & L. 453; *Roadley v. Dixon*, 3 Russ. 202; *Hall v. Hill*, 1 D. & W. 103; S. C., 1 C. & L. 129. In *Holdich v. Holdich*, 2 Y. & C. C. C. 11, an important case on this subject, Sir J. L. Knight Bruce, V. C., after having fully considered all these cases, observes, "I feel bound by the present state of the authorities to say, that a mere gift of an annuity to the testator's widow, although charged on all the testator's property, is not sufficient to put her to her election. I consider myself equally bound by the authorities to say, that a mere gift to the widow of an annuity so charged, and a gift of the whole of the testator's real estate, though specified by name, to some other person, are not together of themselves sufficient to put the widow to her election; and, moreover, that a gift of a portion of the real estate to the widow, whether for life or during widowhood, is not sufficient, as to the residue of the estate, to put the widow to her election in respect of dower." In *Dowson v. Bell*, 1 Kee. 761, where a testator gives "all and singular his freehold lands" to trustees upon certain trusts for his children, subject to an annuity, or *rent-charge for his wife during widowhood, with power of distress, and he also gives to his wife specific legacies and the residue of his personal estate; it was contended, that the gift of "all" the testator's estates, for the purposes of his will, was inconsistent with the abstraction of one-third of those estates for dower, in addition to the benefits given by the will to the widow, and that the remedy by distress for enforcing payment of the annuity applied to all the testator's lands, and was consequently inconsistent with an intention to devise two-thirds of them. However, Lord Langdale, M. R., said, that in the consideration of this question, when a testator speaks of "all his estates," he must be held to mean all his estates subject to the legal rights against them, and amongst them is the wife's right to dower; and that the widow should, therefore, be declared to be entitled both to the annuity and other benefits given to her by the will and to her dower. See also *Thompson v. Nelson*, 1 Cox, 447; *Harrison v. Harrison*, 1 Kee. 765.

A testator's dealings in his lifetime cannot, it seems, be taken into consideration in construing his will, with reference to the question whether he intended to exclude his wife from her dower, when the will contains no reference to those dealings. Thus, in *Gibson v. Gibson*, 1 Drew. 42, where a testator had, before making his will, (under which it was argued a case of election arose,) sold part of his freehold estate, his wife joining to bar her dower, and previously and subsequently to the making of his will he had contracted to lease part thereof, and after the date of his will to sell part to the lessee, and after his will he

entered into an agreement to let another part of his freeholds, with liberty to the lessee to pull down the buildings and erect others, which agreement after the death of the testator the lessee acted upon, it was held by Sir R. T. Kindersley, V. C., that these dealings with the property by the testator could not be taken into consideration by the Court. "The intention," said his Honor, "to exclude the widow's dower must be collected from the will itself; and the Court cannot, in my opinion, look at the evidence of acts done in the testator's lifetime which are not noticed in the will."

The provisions which have generally been held inconsistent with the widow's legal right to dower, are those which prescribe to the devisees a certain mode of enjoyment which shows the testator's intention that they should have the entirety of the property. Thus, in *Birmingham v. Kirwan*, 2 S. & L. 444, the testator devised his house and demesne to trustees upon trust to permit his wife to enjoy the same for life, she paying 13s. yearly for every acre, to keep [*294] the house in repair, and not to let, except to the person who should *be in possession of the remainder; and he devised the residue of his lands, subject to debts and legacies, to A. for life, remainder to B. in fee. The question was as to the wife's right of dower: first, in the part devised to her; secondly, in the residue. "The result," said Lord Redesdale, "of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds. . . . Now, in the present case, it is clear the assertion of a right of dower as to the house and demesne would be inconsistent with the dispositions of the house and demesne contained in the will; and therefore the widow cannot have both. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the enjoyment of the house and demesne, paying a rent of 13s. an acre, which must be out of the whole. Then follow directions that she shall keep the house and demesne in repair, that she shall not alien, except to the persons in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the house and demesne under a right created by the will; and not a part of it under a right which she previously had, and part under the will. . . . Then comes the question, whether the implication extends to the rest of the estate? I cannot, on the whole of the case, think the testator has sufficiently manifested an intent that this beneficial interest in the house and demesne, given upon a reserved rent, and under certain conditions, should be considered as a bar of dower out of the rest of the estate. The will may be perfectly executed as to all other purposes without injury to the claim of dower, with respect to the rest of the estate: it may be mortgaged or sold, subject to that claim." And see *Goodfellow v. Goodfellow*, 18 Beav. 356; see, however, *Strahan v. Sutton*, 3 Ves. 249.

In *Miall v. Brain*, 4 Madd. 119, a testator devised all his real and personal estate to trustees upon trust, as to a certain freehold messuage, for his wife

during her widowhood, and to pay her, out of the rents and profits, an annuity for life; and upon further trust *to permit his daughter to use, occupy, and enjoy* a certain messuage for her life, and after her decease to raise 2000*l.* for her children; and after giving legacies to his other children, the testator gave the residue of his real and personal estate amongst his children, and gave the usual power of *sale to the trustees. Sir J. Leach, M. R., held, that the widow was put to her election. “The testator,” observes his Honor, “directs the trustees to whom he devises his estates to permit his daughter to use, occupy, and enjoy a certain freehold house for her life. I think the testator contemplated for his daughter the personal use, occupation, and enjoyment of his house; and such personal use, occupation, and enjoyment is inconsistent with the widow’s right to dower out of that house. . . . This house is a part of a general devise to the trustees of all his real estate, and the testator has not given this house to the trustees free from the widow’s dower, unless he has so given his whole real estate. I think the testator has shown a plain intent that the trustees should take an interest in this house which would exclude the widow’s dower; and the same intention must necessarily be applied to the whole estate which passes by the same devise.” In *Butcher v. Kemp*, 5 Madd. 61, where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter’s minority*, and the testator devised some lands to his widow for her life, and also gave her several specific and pecuniary legacies, Sir John Leach, V. C., held, that the widow was put to her election. “The question,” said his Honor, “is, whether the testator can be considered as speaking here of his interest in the farm, subject to his widow’s claim of dower? His plain intention is, that the trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about 136 acres; and this intention must be disappointed if the widow could have assigned to her a third part of this land. This case is within the principle of *Miall v. Brain*, which was lately before me, in which I held the claim of dower necessarily excluded by the gift of a house for the personal occupation and enjoyment of the testator’s daughter.” In *Roadley v. Dixon*, 3 Russ. 192, where a testator, after bequeathing to his wife an annuity charged on his estate at S., with power of entry and distress, if it should be in arrear for thirty days, and after giving other legacies and annuities, which he charged on his lands at S., in aid of his personal estate, gave and devised all his real and personal property to trustees upon certain trusts; and he directed them *to occupy and manage, during the minority of his son*, a farm, constituting the greater part of his estate at S., and *to let and manage* the residue of the real estates, and *to receive the rents of the whole* of his real estates, Lord Lyndhurst held, [*296] *that the widow was put to her election between her dower and the [*296] benefits given to her by the will. “Without meaning to say,” observed his Lordship, “that a mere charge of an annuity in favor of the widow, with a clause of entry and distress, would be sufficient to put her to her election; but

considering the particular dispositions which the testator has made of his property,—the charge of the annuity, the clause of entry and distress, the express direction for the occupation of part of the estate by the trustees, the trusts declared with respect to the rents, profits, and issues of the whole of the real estate;—taking all these circumstances together, I think it was the manifest intention of the testator that the whole of his property should be free of dower; and that intention is so clear and distinct as to authorize me to say that the widow must be put to her election.” In this case the Lord Chancellor acts upon and approves of the rule laid down in *Miall v. Brain*, viz., that where a testator devises the whole of the property together in general terms, and it is manifest that it was his intention that one part of the property should not be subject to dower, it follows that no part of the property should be considered as so subject. See *Hall v. Hill*, 1 D. & W. 94; 1 C. & L. 120; decided, in a great measure, on the ground of a power of leasing, which applied to the whole property. See also *Reynard v. Spence*, 4 Beav. 103; *Taylor v. Taylor*, 1 Y. & C. C. C. 727; *O'Hara v. Chainé*, 1 J. & L. 662; *Holdich v. Holdich*, 2 Y. & C. 22; *Lowes v. Lowes*, 5 Hare, 501; *Robinson v. Wilson*, 13 Ir. Eq. Rep. 168, 183; *Pepper v. Dixon*, 17 Sim. 200; *Grayson v. Deakin*, 3 De Gex & Sm. 298; *Parker v. Sowerby*, 1 Drew. 488; 4 De Gex, Mac. & G. 321; and a direction to cut down timber on any part of the estate would, it seems, be entirely inconsistent with the wife's right to dower. *Ib.* It must be considered that *Warbulton v. Warbulton*, 2 Sm. & Giff. 163, (which seems to proceed upon a misapprehension of the judgment of Lord St. Leonards in *Hall v. Hill*, 1 Dru. & War. 94,) is overruled.

There is another class of cases in which much discussion has arisen, where a testator has devised lands, of which his widow is dowable, to herself and others in equal shares. The first case is *Chalmers v. Storil*, 2 V. & B. 222, in which case the words of the will were, “I give to my dear wife A., and my two children B. and C., all my estates whatsoever, to be equally divided amongst them, whether real or personal.” And the testator specified the property bequeathed by him as consisting of freehold ground-rents, money on mortgage, American bank stock, an estate in America, &c. Sir W. Grant, M. R., held, that it was a case of election, the claim of dower *being [*297] directly inconsistent with the disposition of the will. “The testator,” observed his Honor, “directing all his real and personal estate to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which cannot be if the widow first takes out of it her dower, and then a third of the remaining two-thirds. Further, by describing his English estates he excludes the ambiguity which Lord Thurlow, in *Foster v. Cook*, 3 Bro. C. C. 347, imputes to the word ‘my estate,’ as not necessarily extending to the wife's dower.” As to the last remark being one ground for his Honor's decision, it is clear at the present day, if not in the time of Lord Thurlow, that such a devise as “all my English estates” would merely mean and pass the testator's English estates, subject to dower. See *Read v. Crop*, 1 Bro. C. C. 492; *Dowson v. Bell*, 1 Kee. 761; *Gibson v. Gibson*, 1 Drew. 50. The other and principal ground upon which *Chalmers v.*

Storil was decided—viz., that equality, which was intended, would be destroyed by letting in the claim to dower—has been followed by subsequent judges. Thus, in *Dickson v. Robinson*, Jac. 503, the testator gave his real and personal estate to his wife in trust for the equal benefit of herself and her two daughters. Sir Thomas Plumer, M. R., said that he could not distinguish the case from *Chalmers v. Storil*. “The substance of the will,” said his Honor, “is, that there should be an equal division of the property, which cannot take place if the widow is to have a third. The real and personal estate are united together; the personal estate is not subject to any antecedent claim; and, is not the real estate intended to be given in the same manner? The principle certainly is, that the Court will go as far as it can, not to exclude the claim of dower; but here it would be inconsistent with the will.” In *Roberts v. Smith*, 1 S. & S. 513, the testator, after giving his wife an estate in fee, and certain legacies, devised gavelkind lands, and all other his property of what nature or kind soever to his wife and two other persons in trust, as to one moiety, for the maintenance of herself and her children by a former marriage, and as to the other moiety, for his children. Sir J. Leach, V. C., held, that the widow was put to her election. “The principle,” said his Honor, “referred to in *Chalmers v. Storil* decides this case. The plain intention of the testator was, that the wife should have half the income of his property, for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator’s own children. That intended equality would be *disappointed if the wife were in the first [*298] place to take her dower.” See also *Reynolds v. Torin*, 1 Russ. 129.

Although *Chalmers v. Storil* has been so often recognized and followed as an authority, it scarcely seems to have been decided upon correct principles; because, when a person devises “all his estates” to his widow and children, “equally to be divided among them,” he, according to the ordinary rules of construction, would be held to devise only what belonged to him—viz., the estate, subject to the widow’s right to dower; and an equal division of the estate after the assignment of the widow’s dower by metes and bounds would fully satisfy the word of the will. See 1 Jarm. on Devises, 402; *Ellis v. Lewis*, 3 Hare, 315. In a recent case, Sir W. Page Wood, V. C., stated that *Chalmers v. Storil* is imperfectly reported; see *Bending v. Bending*, 3 K. & J. 261.

If a man devises his real estate from his heir, after giving his widow a provision in lieu, satisfaction, and bar of dower, and the devisee dies in the lifetime of the devisor, the heir will take the estate, but the widow will be obliged to elect. See *Pickering v. Lord Stamford*, 3 Ves. 337. But a gift by a testator to his widow in lieu of thirds of his personal property, does not preclude her from claiming her share of the personalty under the Statute of Distributions, in the event of the failure of a bequest of that property. Thus, in *Pickering v. Lord Stamford*, 3 Ves. 492, where a testator gave part of his real and personal property to his wife in lieu of dower or thirds, which she could claim out of his real or personal estate, or either of them, and

bequeathed the residue of his personal estate (part of which consisted of real securities) to his executors, for charitable purposes, which bequest was of course void as to the real securities; it was held by Lord Loughborough, affirming the decision of Lord Alvanley, M. R., (3 Ves. 332,) that the widow was not barred by the clauses in the will. His Lordship observed,—“Neither an heir-at-law, nor by parity of reasoning next of kin, can be barred by anything but a disposition of the heritable subject or personal estate to some person capable of taking. Notwithstanding all the words of anger and dislike applied to the heir, he will take what is not disposed of. It is impossible to make a different rule as to personal estate, with regard to what is not disposed of. Here is a legal intestacy, for the gift to the charity is void at law. Being a legal intestacy, I am to control the Statute of Distributions. How can the Court possibly do that? I must close the will, and cannot look at it.” See *Sympson v. Hornsby*, cited 3 Ves. 335. But it seems that the principle of the decision in *Pickering v. Stamford* will not apply to a case where, on the [*299] face of the will, there is an intestacy as *to a great part of the estate: *Lett v. Randall*, 3 Sm. & G. 83, 91, n.

A provision made for a wife, “for her jointure, and in lieu of dower and thirds at common law,” does not extend to her share of the personal estate under the Statute of Distributions: *Colleton v. Garth*, 6 Sim. 19. But the addition of the words “out of any real or personal estate” has been held to do so, (*Gurly v. Gurly*, 8 C. & F. 743;) and the words “in lieu of dower or thirds at common law, or otherwise,” have been held to extend to a wife’s freebench in copyholds: *Nottley v. Palmer*, 2 Drew. 93.

With regard to widows married since the 1st January, 1834, questions of election will less frequently arise, as dower may now be much more readily barred by the husband. See 3 & 4 Will. 4, c. 105, ss. 4, 5, 6, 7, and 8; and by s. 9 it is enacted, “that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will;” and by the 10th section it is enacted, “that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.”

The doctrine of election is not applicable to creditors taking the benefit of a devise for the payment of debts, and also enforcing their legal right against other funds disposed of by the will: *Kidney v. Coussmaker*, 12 Ves. 136. See also *Clark v. Guise*, 2 Ves. 617. In *Deg v. Deg*, 2 P. Wms. 412, 418, where a father devised his own estate and an estate of his son’s for the payment of debts, the son was allowed as a creditor of his father to share with the other creditors in the benefit conferred upon them by the provision for payment of debts, without being obliged to give up his own estate. But these questions will not arise often now, as real estates are liable to the payment of debts by simple contract as well as specialty. See 1 Will. 4, c. 104.

A person will not be obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another, who has elected to take in opposition to the instrument. Thus it was held, that a husband might be tenant by the curtesy of an estate-tail, which his wife had elected to take in opposition to a will, under which he had accepted benefits: *Lady Cavan v. Pulteney*, 2 Ves. jun. 544; 3 Ves. 384. See also *Brodie v. Barry*, 2 V. & B. 127.

A person entitled in remainder, to an interest in property, is not *bound by the election of a person having a prior interest: *Ward v. Baugh*, 4 Ves. 623; *Long v. Long*, 5 Ves. 445. See also *Hutchison v. Skelton*, 2 Macq. H. L. Cas. 492, 495.

Privileges of persons compelled to elect.—Persons compelled to elect are entitled previously to ascertain the relative value of their own property, and that conferred upon them: *Newman v. Newman*, 1 Bro. C. C. 186; *Wake v. Wake*, 3 Bro. C. C. 255; 1 Ves. jun. 335; *Chalmers v. Storil*, 2 V. & B. 222; *Hender v. Rose*, 3 P. Wms. 124, n.; *Whistler v. Whistler*, 2 Ves. jun. 367, 371. In *Boynton v. Boynton*, 1 Bro. C. C. 445, although Lady Boynton had by her answer elected to take her dower, instead of the benefit given to her by her husband's will, Sir Thomas Sewell, M. R., declared on the hearing, that as no account of the testator's personal estate and of his debts had been taken, she was not obliged to make any election until the account should be taken, and it should appear out of what real estate she was dowable at the time of the testator's decease; and it was referred to the Master to take an account of the personal estate, and also to state out of what estate she was dowable.

A person compelled to elect may file a bill to have all necessary accounts taken; *Butricke v. Brodurst*, 3 Bro. C. C. 88; 1 Ves. jun. 171; *Pusey v. Desbouvrie*, 3 P. Wms. 315; and an election made under a mistaken impression, will not be binding, for in all cases of election the Court, while it enforces the rule of equity, that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds: *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Wake v. Wake*, 3 Bro. C. C. 255; *Kidney v. Coussmaker*, 12 Ves. 136; *Dillon v. Parker*, 1 Swanst. 381, and note.

What will be considered as an election.—Election is either *express* (about which it is unnecessary to say anything) or *implied*. And here considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question, it seems, must be determined more upon the circumstance of each particular case, than upon any general principle.

On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties [*301] *does not yield rent to be received, and the party liable to elect deals

with it as his own,—as, for instance, by mortgaging it (particularly if this be done with the knowledge and concurrence of the party entitled to call for an election,)—such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property: *Padbury v. Clark*, 2 Mac. & G. 298; and see *Morgan v. Morgan*, 4 Ir. Ch. Rep. 606, 614. As we have before seen, any acts, to be binding upon a person, must be done with a knowledge of his rights. They must also be done with the intention of electing: *Stratford v. Powell*, 1 Ball & B. 1; *Dillon v. Parker*, 1 Swanst. 380, 387; *Edwards v. Morgan*, M'Clell. 541; 13 Price, 782; 1 Bli. N. S. 401; *Worthington v. Wigington*, 20 Beav. 67; *Wintour v. Clifton*, 21 Beav. 447, 468; 26 L. J. N. S., Ch., 218; *Campbell v. Ingilby*, 21 Beav. 582.

It is difficult to lay down any rule as to what length of time, after acts done by which election is usually implied, will be binding upon a party, and prevent him from setting up the plea of ignorance of his rights. In *Wake v. Wake*, 1 Ves. jun. 335, it was held that three years' receipt of a legacy and annuity, under a will by a widow in ignorance of her rights, did not preclude her from making her election; and in *Reynard v. Spence*, 4 Beav. 103, where a widow had received an annuity for five years, it was held, she had not elected. See also *Buttricke v. Brodhurst*, 3 Bro. C. C. 90; S. C., 1 Ves. jun. 172; *Dillon v. Parker*, 1 Swanst. 386.

But a person may by his acts suffer specific enjoyment by others until it becomes inequitable to disturb it: *Tibbits v. Tibbits*, 19 Ves. 663.

Acts of implied election which will bind a party will also bind his representatives: *Earl of Northumberland v. Earl of Aylesford*, Amb. 540, 657. See also 2 Ves. 525; *Stratford v. Powell*, 1 Ball. & B. 1; *Ardesoife v. Bennet*, 2 Dick. 463; and some acts, which it appears would not be binding upon him if insisted upon in his lifetime, will bind his representatives, "upon that principle only," as observed by Lord Hardwicke, "not to disturb things long acquiesced in in families, upon the foot of rights which those, in whose place they stand, never called in question:" *Tomkyns v. Ladbroke*, 2 Ves. 593. But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them and determine for themselves: *Dillon v. Parker*, 1 Swanst. 385; *Moore v. Butler*, 2 S. & L. 268; *Tysen v. Benyon*, 2 Bro. C. C. 5.

[*302] If election be doubtful it may be *sent to a jury to determine that fact: *Roundell v. Curren*, 2 Bro. C. C. 73; 1 Swanst. 383, n.

The recent case of *Harris v. Watkins*, 2 K. & J. 473, seems to have been decided scarcely in accordance with the principles deducible from the authorities. There a testator devised his residuary, real, and personal estate to his wife "in lieu and discharge of all money which he had borrowed out of and forming part of the trust moneys, mentioned in the settlement made on his marriage with her," and he made his wife executrix. She died three days after the testator, and without having possessed herself of any of his real or

personal estate. On the testator's death the widow became entitled to the trust moneys under the settlement absolutely. The evidence as to the relative value of the property given to the widow by the will, and the money which she would be entitled to out of her husband's estate in payment of the trust moneys borrowed by him, seems to have been involved in much obscurity. It was held by Sir W. P. Wood, V. C., that the Court could not presume a disclaimer by the widow, and consequently that her heir was entitled to the devised estate, and the debts claimed by her administrator as due to her from the testator were discharged. His Honor thought it was not so much whether the Court would presume election, as whether it would presume a rejection of the devise. That there was no evidence as to any disclaimer, and that the only question was whether, having regard to the circumstances of the devisee's death, and to the relative values of the estate devised and of the debts to be discharged, the Court was called upon to presume a disclaimer. "Whether," his Honor added, "circumstances might not exist under which the Court would be justified in presuming a disclaimer, is a question of some nicety. I am not aware of any authority upon the point; but I apprehend that in a strong case,—for instance, if a testator devised real estate worth £10,000 only, and declared that it should be taken in lieu and discharge of debts to the amount of £20,000, in such a case, it being manifest that it would be to the disadvantage of the devisee to retain the estate upon the terms mentioned in the will, the Court, in the event of the devisee dying under circumstances like the present, would, as between his real and personal representatives, struggle hard to presume a disclaimer; but where it is not manifest that it would be for the advantage of the devisee to retain the estate upon the terms proposed by the testator, the ground of that presumptions fails, and the presumption does not arise."

Where an infant is bound to elect, in some instances, as in *Streatfield v. Streatfield*, the period of election is deferred until after the infant comes of age. See **Boughton v. Boughton*, 2 Ves. 12; *Bor v. Bor*, 3 Bro. P. C. 173, Toml. ed. In other cases there has been a reference to the Master, to inquire what would be most beneficial to the infant: *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300, Toml. ed.; 2 S. & L. 266; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 285, n.; *Gretton v. Haward*, 1 Swanst. 413; *Ashburnham v. Ashburnham*, 13 Jur. 1111. The practice as to election by married women also varies; see Mr. Swanston's note to *Gretton v. Haward*, 1 Swanst. 413; but in general there will be an inquiry what is most beneficial for them, and they will be required to elect within a limited time. See *Pulteney v. Darlington*, 7 Bro. P. C. 546, 547, Toml. ed.; 2 Ves. jun. 560; 3 Ves. 385; *Vane v. Lord Dungannon*, 2 S. & L. 133; *Davis v. Page*, 9 Ves. 350; *Ebrington v. Ebrington*, 5 Madd. 117. In *Wilson v. Lord John Townsend*, 2 Ves. jun. 693, Lord Rosslyn, although he admitted that to be the general practice, dismissed the bill without a reference, as the married woman "had manifestly a much better interest than the testatrix intended." See also *Ardesoife v. Bennet*, 2 Dick. 463; *Parsons v. Dunne*, 2 Ves. 60; *Belt's Suppl.* 276. A married woman, otherwise than by deed ac-

knowledge, is not competent, during coverture, to elect between a jointure made to her after marriage and her dower at common law, (*Frank v. Frank*, 3 My. & Cr. 171; and see *Campbell v. Ingilby*, 21 Beav. 567;) nor can she elect to relinquish a reversionary chose in action: *Robinson v. Wheelwright*, 6 De G. Mac. & G. 535, 546; *Whittle v. Henning*, 2 Ph. 731, overruling *Wall v. Wall*, 15 Sim. 513. But see now 20 & 21 Vict. c. 57, fully noticed in the note to *Ryall v. Rowles*, vol. ii., post.

A person who does not elect within the time limited will be considered as having elected to take against the instrument putting him to his election. See the decree in *Streatfield v. Streatfield*, 1 Swanst. 447.

Parties disappointed by the election of the heir to take against a will, by requiring the executors to complete a contract for an estate entered into by the testator, have no lien on the estate for the amount of the benefits the heir has taken under the will, but after his death they are entitled to prove against his estate for the amount which he has so received: *Greenwood v. Penny*, 12 Beav. 402.

It may be here mentioned that under 36 Geo. 3, c. 52, and 45 Geo. 3, c. 28, no legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election; but where a testator devises his own real estate to one person, and bequeathes such person's personal estate to a third party, legacy duty will be payable on the value of the personal estate so charged on the testator's real estate: *Laurie v. Clutton*, 15 Beav. 131.

The principle of election, treated in the preceding note, is recognized and established in this country, almost exactly as in England. It rests upon the equitable ground, that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument, is bound to give full effect to that instrument as far as he can: a person cannot accept and reject the same instrument, or, having availed himself of it as to a part, defeat its provisions in any other part: and this applies to deeds, wills, and all other instruments whatsoever. See *M'Elfresh, Adm'r, v. Schley and Barrs*, 2 Gill, 181, 201, 202; *Field v. Eaton*, 1 Devereux, Equity, 283, 286, 287; *Ex'rs of Cogdell v. Widow, &c.*, 3 Dessaus-

sure, 346, 387; *Whilden v. Whilden*, Riley's Chancery, 205, 207; *Cauffman v. Cauffman*, 17 Sergeant & Rawle, 16, 24, 25; *Stump and others v. Findlay and others*, 2 Rawle, 168, 174; *Preston v. Jones*, 9 Barr, 456; *George v. Bassing*, 15 B. Monroe, 558; *Tiernan et al. v. Roland and Blackstone*, 3 Harris, 430, 450; *Smith v. Gould*, 7 W. & S. 238; *Palton v. Moore*, 1 Casey, 468; *Smith v. Gould*, 34 Maine, 442; *Glen v. Fisher*, 6 Johnson's Chancery, 33, 35; see 2 Smith's Leading Cases, 5th Am. ed. 196.

It has been said, very justly, that "the cases arising under the doctrine of election are susceptible of being divided into two classes; first, those of election proper, where something is given by the will to one who is en-

titled to some other thing disposed of by the said will to another, in which case the devisee is put to choose whether he will take that which is given, or that to which he has a claim; and secondly, those cases in which there is an express condition annexed to a devise, with which the devisee must comply, or not take the property; in which case he is to elect whether he will comply with the condition or give up the property; but in which, if he does not comply with the condition, he violates none of the provisions of the will as to any other person than himself;" *Hall v. Hall*, 2 M'Cord's Chancery, 269, 306. This distinction undoubtedly exists, and, in some parts of this subject, is important. Wherever there is in the will a clear intention that a legatee or devisee shall not take but upon terms of giving up something else, there is a condition, affecting the title of the party to the legacy or devise; but election in equity, depends upon the inconsistency of holding both interests, even though the testator may not have been aware that his will would give rise to any such inconsistency, and therefore may not have contemplated that the party should be put to an election.

In all cases, the intention to create an election, or the intention to make such dispositions as raise an election,—that is to say, the construction upon which the party is put to an election,—must be clear upon the face of the will: a party will never be put to an election upon a doubtful construction; *M'Elfresh, Adm'r, v. Schley and Barr*, 2 Gill, 182, 201, 202; *Jones v. Jones*, 8 Id. 139; *Havens v. Sackett*, 5 New York Reports, 365; *Watson v. Howard*, 1 Mary-

land, Ch. 112; and the intention must be derived from the will itself, and not from evidence *dehors*; *City of Philadelphia v. Davis*, 1 Wharton, 490, 502; *Timberlake v. Parish's Ex'or*, 5 Dana, 345. The bar of an election is, in fact, in the nature of an estoppel, and, like every estoppel tending to defeat rights which would otherwise be valid, and consequently operating as a forfeiture, should be certain in every material particular, both as it regards the duty or obligation to elect, and the acts by which the election is alleged to have been made; *Jones v. Jones*; *Fitts v. Cook*, 5 Cushing, 596; see 2 Smith's Leading Cases, 453, 5th Am. ed. And the inconsistency which puts a party to an election, must arise out of the same instrument: and therefore, if one devises certain land to A. and certain other land to B., and afterwards by deed, conveys to B. the land formerly devised to A., B. is not put to an election, but shall hold both the land devised, and that conveyed; *Thompson v. Thompson*, 2 Strobhart, 48.

It is universally agreed, in this country, that the principle upon which equity enforces an election, in a case where there is not a condition, is compensation, not forfeiture. If a benefit is given by a will, and some property or interest of the legatee is given to a third person, if the first legatee elect to retain his property, he does not forfeit all benefits given him by the will, but is only bound to make compensation to the disappointed party according to the value of the interest given; *Key v. Griffin*, 1 Richardson's Eq. 67, 68; *Stump & others v. Findlay and others*, 2 Rawle, 168, 174; *Cauffman v. Cauffman*, 17 Sergeant and Rawle, 16, 24, 25; *City of Philadel-*

phia v. Davis, 1 Wharton, 490, 502. See *Tiernan et al. v. Roland & Blackstone*, 3 Harris, 430, 451. Lapse of time, and still more, the introduction of third parties as purchasers, on the faith of the acquiescence in the validity of a will, implied in accepting a benefit under its provisions, may, however, no doubt render an election absolutely binding, and preclude the right to avoid it by a tender of compensation; *Fulton v. Moore*, 1 Casey, 468, 476. An election between legal rights, or by compulsion of law, as where a widow is bound by statute to choose between her dower at common law in the land, and the rights conferred upon her by act of assembly, will, as it would seem, when once made, be binding, unless shown to have been procured by fraud or undue influence; *Buist v. Somers*, 1 Richardson's Eq. 281.

Equitable election usually arises when a testator gives to A. certain property real or personal, and in the same will gives a third party certain property belonging to A.; in this case, A. must elect between the two; if he accepts the legacy or devise to himself, he must confirm and carry out the gift of his own property to the third party; and if he file a bill for the legacy, equity will compel him to make his election within a certain time, and to execute such conveyances as will give effect to the gift of his property which the testator has made: and this applies equally to the case where a testator disposes of property belonging to his wife in her separate right; *Field v. Eaton*, 1 Devereux's Equity, 283, 286; *Wilson v. Army*, 1 Devereux and Battle's Equity, 376; *M^cQueen v. M^cQueen*, 2 Jones's Equity, 16; *Upshaw v. Upshaw and others*, 2 Hening & Munford, 381;

Kinnaird, Ex'r, &c. v. Williams's Adm'r et al., 8 Leigh, 400; *Brown v. Ricketts*, 3 Johnson's Chancery, 553, 556; *Allen v. Getz*, 2 Penrose and Watts, 311, 323; *Preston v. Jones*, 9 Barr, 457; *Hall v. Hall*, 1 Bland, 130, 134; *Craig v. Craig and Hart*, 7 Dana, 1, 5; *Ex'rs of Cogdell v. The Widow, &c.*, 3 Dessaussure, 346, 388; *M^cGinnis et al. v. M^cGinnis*, 1 Kelly, 496. "Ever since the case of *Noys v. Mordaunt*," said Gaston, J., in *Melchor v. Burger*, 1 Devereux and Battle's Equity, 634, "it has been holden for an established principle of equity, that where a testator by his will confers a bounty on one person, and makes a disposition in favor of another *prejudicial* to the former, the person thus prejudiced shall not insist upon his old right, and at the same time enjoy the bounty conferred by the will. The intention of the testator is apparent that both dispositions shall take effect, and the conscience of the donee is affected by the condition thus *implied*, that he shall not defraud the design of the donor by accepting the benefit, and disclaiming the burthen—giving effect to the disposition in his favor, and defeating that to his prejudice. The donee is therefore put to his election, either to take the thing given, and confirm the will; or retaining what is his independently of the will, to surrender to the disappointed devisees or legatees, so much of what the testator has given him, as will compensate them for the disappointment." It makes no difference, in regard to election, whether the testator knew that the property he attempted to dispose of, belonged to another, or whether he mistakenly supposed that it was his own; *M^cGinnis et al. v. M^cGinnis*, 1

Kelly, 496, 503; *Stump and others v. Findlay and others*, 2 Rawle, 168, 174. But the intention to dispose of property which calls for an election, must be clear and unequivocal, both in respect to the particular property which is the supposed subject of disposal, and in respect to the design and attempt to dispose of it. "To put the legatee to his election," said Ruffin, C. J., in *Wilson v. Army*, 1 Devereux and Battle's Equity, 376, 377, "it is necessary that the instrument should clearly ascertain the property given, and that the gifts themselves should be in such terms, as are inconsistent with the notion that the donee can keep his own estate, and also take, under the will, without defeating the intention of the testator. It is, in other words, in the nature of a condition, and generally speaking, that condition is implied from the nature of the several dispositions; and where the implication is not plain therefrom, and almost necessary, such a condition cannot be implied, because no one in a doubtful case, is to be taken as intending to give away what belongs to another." "The intention of the testator, that such devisee should be put to an election," said Bland, C., in *Hall v. Hall*, 1 Bland, 130, 135, "must be either distinctly expressed, or very strongly manifested by facts and circumstances; for, no one can be stripped of his rights by guessing or conjecture. It must distinctly appear, that the claim is irreconcilable and incompatible with the devise; or that to sustain the claim, would throw the testator's estate into a channel entirely different from that in which he had placed it by his will. To prevent such a perversion, or dis-appointment of the express, or clearly

manifested intention of the testator, a court of equity will, by a strong operation of its powers, put the devisee to an election. But there is no instance of a devisee being made to elect upon slight presumptions or inferences; or where the will might have its full effect without impairing the obligation of the claim; or where the testator has property, which is absolutely his own, answering fully to the description of that spoken of in his will, and by which all its expressions may be satisfied." Accordingly, it was held in that case, that a devise of all the testator's "estate, real and personal," would not be considered as including an estate tail, so as to put the heir in tail to an election, though the testator might have disposed of the estate tail in his lifetime.

[It is accordingly well settled, that to call the doctrine of election into operation, the gift to one party must be absolutely irreconcilable with the right or title which the other is asked to waive or relinquish, and that no election need be made if both can, in any way, stand together; *Havens v. Sackett*, 15 New York Reports, 365. Thus, a devise to a wife, for life, of certain leaseholds, and "of all my funded property and estate whatsoever," followed by a bequest of "the sum of £300, 4 per cent.," to a third person, was held not to render it incumbent on the wife to elect between resigning the leaseholds and giving effect to the bequest of the stock, although it appeared that the only stock owned by the testator became the property of his wife by survivorship upon his death; because the bequest did not refer with sufficient clearness to the funded property which the testator then had, and might have

had reference to such stock as he might subsequently acquire; *Dammer v. Pitcher*, 2 Mylne & Keene, 262; 5 Simons, 35. In like manner, where land was devised to A., and stock which belonged to him, bequeathed by the same will to B., A. was permitted to retain both the land and the stock, on the ground that the testator had a contingent interest in the stock, and might have meant to give the stock, only in case the contingency happened; *Havens v. Sackett*.]

As election depends upon the apparent intent of the testator, at the same time that he gives to one legatee a portion of his own property, to give to another certain property, which, in fact, then belongs to the former legatee; it can never arise where the legatee had not, at the time of the execution of the will, any interest or right in the latter property; for, though a will, in respect of its legal operation, takes effect only at the death of the testator, yet, in arriving at intention, regard must be had to the state of things existing at the time the will is made, and not to subsequent circumstances, unless they are expressly referred to and provided for; accordingly, where a testator bequeathed a legacy to his daughter, and a certain slave to another person, and afterwards, during his life, gave the slave to his daughter, it was held that the daughter was not obliged to elect between accepting the legacy and retaining the slave, but was entitled to both: it was a mere ademption of the legacy of the slave in his will; *Long v. Wier*, 2 Richardson's Equity, 283; see also *Hall v. Hall*, 2 M'Cord's Chancery, 269, 300.

The principle of election, by implication, in equity, depends upon the

circumstance that the same instrument which transfers or conveys certain property of the testator's to one legatee or devisee, transfers or conveys certain other property to another legatee or devisee, and that the former beneficiary, availing himself of the instrument in one particular, must not defeat its operation in another. But if the latter devise or bequest be invalid—if the instrument in respect to it be legally inoperative and void—the former beneficiary's retaining his own property does not defeat the operation of the instrument. If it be a will, it does not defeat the intention of the testator legally declared. Retaining the subject of a transfer does not disappoint the instrument, if the law has already avoided and nullified the transfer. This occurs in the case of a devise of lands by a feme covert, or an infant, or under a will not executed so as to pass lands. There is in such cases no election from *implied* intention. But still there may be, from actual intention on the part of the testator. And this brings up the distinction mentioned at the beginning of this note, between an election based upon a condition, and an election enforced by a court of equity, upon mere implication; a distinction, plain enough, abstractly, but of infinite difficulty in the application. It may, perhaps, be said, in general, that if it be expressly declared in the will, or if the dispositions in the will are such that it is plainly apparent, that the testator did not intend one devise or bequest to take effect unless in the case of another's taking effect—if the several devises or bequests are so connected together and dependent upon one another, that one cannot take effect according to the testa-

tor's intention without the other—then, it is a condition, and the legatee or devisee accepting a benefit under such an arrangement must give effect to other devises forming an inseparable part of such an arrangement, even though these other dispositions are not valid and legal as devises. A case of mere equitable election arises where only the *instrument*, or the operation of it, would be disappointed in part: if the purpose, object, and actual intention of the testator in regard to making a particular devise or legacy would be violated and defeated, without the devisee's or legatee's carrying out such object and intention, it is a condition. This subject was discussed in *Melchor v. Burger*, 1 Devereux and Battle's Equity, 634. The distinction is there stated between a devise or bequest to the heir, on condition of giving up the land to which he would be otherwise entitled, and a case of election proper, arising from equitable implication. If a condition of giving up the lands to another be annexed to a legacy to the heir-at-law, though in a will not executed so as to pass lands, the heir could not claim the legacy without complying with the condition; but if the two things be not thus connected by a condition, but there be merely a bequest to the heir, and a devise of real estate to some other person, by one not having legal capacity to make such a disposition, or in a will not sufficiently executed for the purpose, though the instrument be operative in regard to personalty, there is no obligation on the heir to elect between his rights as heir, and the personal benefit bequeathed by the will; the attempted devise being nought, affords, it is said, no legal evidence of an intention to

devise away. "If no more appears," says Gaston, J., in that case, "than a devise from the heir, and a bequest of personalty to him, in a will sufficiently executed to pass personal, but not sufficiently executed to pass real estate, it is a good-will of the personalty; it is no will as to the lands; there is no implied condition of election; and the heir may keep the lands descended, and also take his legacy. In *Snelgrove et al. v. Snelgrove et al.*, 4 Dessausurre, 274, 300, the same principle was decided; [while it was held in *Jones v. Jones*, 8 Gill, 197, that accepting a benefit under a devise in one State, will not render its provisions obligatory on the devisee in another, unless it has the requisites necessary to render it effectual in the latter, or is so worded as to show distinctly that the testator intended that the gift which is effectual, should be conditional on that which is not.] That the legacy, however, may be so inseparably connected with the devise, and dependent upon it, as to be in effect conditional, is shown by *Nutt v. Nutt et al.*, 1 Freeman's Chancery, 128. There, a devise of the testator's whole real and personal estate was made to one who was not the heir-at-law, by a will executed so as to pass personalty, but not so as to pass real estate, and legacies were charged on it payable to the heirs-at-law and others. It was held, that as the devise was of the fund, out of which, in part, the legacies were to be paid, the legacy was clearly upon an implied condition that the devise should take effect, and equity would give effect to it, and put the heir to an election.

How far the doctrine, that a void devise does not put a party to an election applies to a devise of after-ac-

quired lands, which independently of special legislation, is an inoperative disposition, has been discussed in some of the American cases. In *Hall v. Hall*, 2 M'Cord's Chancery, 269, 299, 306, a testator, having made a provision for his wife in his will, expressly declared that it "should be taken in lieu and bar of all claim of dower, inheritance, or any other claim on her part," and the question arose whether she was bound to elect in reference to her title as distributee of the after-acquired lands. The case, however, was decided against the necessity of election, on the ground that it did not sufficiently appear, that the testator had reference to after-acquired lands, when he inserted that clause; the presumption, in fact, being that he referred only to the estate which he then had. The *City of Philadelphia v. Davis*, 1 Wharton, 490, 503, went upon the same ground, that it did not clearly appear that the testator was intending to dispose of after-acquired lands: but Kennedy, J., declared his own opinion, and that of a majority of the court, to be, that if the testator had intended to dispose of after-acquired lands, a legacy to the heir-at-law would not have made a case for election. He said, that where there is a devise or bequest on a condition, express, or implied from a construction that admits of no doubt or uncertainty, the devisee or legatee cannot take the benefit except upon the condition: but where the election arises only impliedly, from a legacy being given to one, and lands which would descend on him being disposed of to another, a devise that is inoperative and invalid, as of after-acquired lands, will not create an election. This doctrine, however, is entirely

contradicted by *M'Elfresh, Adm'r, v. Schley and Barr*, 2 Gill, 182. There, a testator devised and bequeathed to one of his sisters, A., all his real and personal estate, "of which he was then possessed, or of which he might be possessed, at the time of his death;" and to another sister, B., he gave certain real and personal estate. The question was, whether B. could claim this devise and bequest, and also her share as heir-at-law, in a certain farm purchased by the testator after the execution of his will. The Court of Appeals held, that though the principle of election did not apply in the case of void wills, such as a will of lands of a feme covert or an infant, or one not executed so as to pass lands, those not being wills, and not capable of being read in evidence, and therefore not adequate to demonstrate intention; yet, that it did apply wherever the will was properly in evidence, and the intention clearly indicated, though the devise was ineffective, as in case of a disposition of after-acquired lands. They said, that there might be an implied condition in a devise or bequest to an heir-at-law, if the intent was plain and clear, as well as an express condition: and accordingly they held that B. was put to her election in respect to her claim upon the after-acquired lands. This last decision appears to put the subject upon its true footing. An election will not be enforced unless the intent to dispose of after-acquired lands be clear and undeniable: but if such an intent clearly appear, the matter stands exactly upon the same ground with every other disposition of property which the testator does not own. The opinion of Mr. Justice Kennedy in *City of Philadelphia v.*

Davis, 1 Wharton, 490, 509, that a devise of after-acquired lands is "void, invalid, and in effect no will with respect to those lands," seems to be an entire misconception. The *devise* of after-acquired lands is not *void*; it is, legally, a valid devise; the only difficulty is, that the testator has no power over the *subject* of the devise. It is simply a devise of property which the testator does not own and over which he has no control. It is then exactly on the footing of every other attempt to dispose of property belonging to others. All such devises are inoperative; and yet they raise a case of election. The case where the instrument, or some particular part of it, is insufficient and legally void as a declaration of intention, and as a transfer of such rights as the testator may have, is totally different from the case where the instrument is in all respects unexceptionable in law, but a part of it finds no subject upon which it can operate effectively.

The remarks of Sir W. Grant, M. R., in *Kidney v. Coussmaker*, 12 Vesey, 136, 154, referred to in the preceding note, that the doctrine of election is inapplicable to creditors, if it is to be regarded as the announcement of a general principle, is opposed by decisions in this country, and seems not to be well founded. It has been decided, in Pennsylvania, that creditors taking a benefit under an instrument making provision for them, cannot object to any of the conditions or terms of the instrument, nor to any provisions which it makes to other persons. In one case, a debtor mortgaged property to three distinct creditors, two of whom (including the plaintiff) had advanced, at the date of the mortgage, the amounts secured

thereby, but the third had not then done so, but afterwards made up the deficiency by further advances. The plaintiff, after having joined in suing out the mortgage, claimed to appropriate the proceeds to the exclusion of the third creditor, who had been secured in the mortgage for advances not then made, on the ground that the plaintiff, by seeing the land apparently protected by this mortgage, might have been prevented from proceeding against it by other methods. "It must, perhaps, be conceded," said Gibson, C. J., in delivering the opinion of the Court, "that a mortgage to secure future advances, which does not contain notice of the agreement, is void against creditors generally, because the land is apparently covered for more than it actually owes, and pursuit might thus be eluded, when a knowledge of a true state of the facts would invigorate exertion, and render success certain. Had the plaintiff claimed as a general creditor, the mortgage might not have entitled the others to a preference. But, so far is he from having treated it as fraudulent, that *he has elected to claim under it*. Now, there is no rule of equity more universal in its application, nor more just in its consequences, than that a party shall not claim in repugnant rights, and that he who takes the benefit shall also bear the burden. The books are full of cases which show, that a party shall not contest the validity of an instrument from which he draws a benefit, or affirm it in part and disaffirm it in part. Here the plaintiff might have repudiated the whole transaction, and stood on his former rights: but, claiming to participate in the benefit, he can be admitted only on the terms prescribed

by the mortgagor. It cannot be believed that the mortgagor would have preferred the plaintiff at the expense of the general creditors, on any other terms than having his assent to the mortgage as a security for those future advances; to withhold it now, would be a fraud on him." *Irwin v. Tabb*, 17 Sergeant & Rawle, 419, 423. The same principle was enforced in *Adlum v. Yard*, 1 Rawle, 163, 171. In that case, the plaintiff, having taken a dividend under a voluntary general assignment of his debtor, sought to attach a certain interest as being the debtor's and not vested in the assignees, on the ground that the assignment was fraudulent for restraining the assignee from selling for three years. That restriction, said Gibson, C. J., undoubtedly brought the deed within the purview of the st. 13 Eliz.; and "the plaintiff might originally have repudiated this assignment, but having taken a dividend under it, he shall not now question its validity. Where money is actually received, and on an implied condition that the receiver shall not question the title, every principle of natural justice requires that the condition should be performed. But it is supposed that the doctrine of election is inapplicable to creditors. There is no adjudication in support of this, but *Kidney v. Coussmaker*, from which, in the broad terms in which the principle is predicated, I entirely dissent. That was the case of a devise of part of the estate to trustees for payment of debts; and it was held that the creditors having obtained from the trust fund, satisfaction only in part, were not precluded from recourse to other parts of the estate which passed by the same will. To this I entirely

assent, because the creditors could not be viewed as legatees, and the setting apart of a portion of the estate for the sake of convenience, indicated no intention that the creditors should not be paid in the event of its falling short. The law, therefore, would not imply a condition that the creditors should relinquish their right on the rest of the estate. But the unqualified assertion of the Master of the Rolls, that the doctrine of election is utterly inapplicable to creditors, seems to be received with many grains of allowance, even in England. (1 Hovenden's notes to Vesey, 172.) In *Irwin v. Tabb*, we applied it to creditors claiming different debts, under the same mortgage. In the case at bar, the debtor might prescribe the terms; and the plaintiff having received his dividend on an inherent condition to permit the whole arrangement to take effect, it seems clear, that, subsequent to the period of acceptance, the debt attached as due to the assignor, was, to every intent, vested in his assignees." See 2 Smith's Lead. Cases, 190, 5th Am. ed.

The application of the doctrine of election to the case where a devise or bequest is made to the widow of the testator, and the estate of which she would be dowable, is disposed of to others, has been much discussed; and though the general principle belonging to the subject is settled and unquestioned, the bearing of it in particular instances has led to some conflict in the decisions. The general rule is agreed to be, that as dower is a legal interest vested in the wife by the act of the law, paramount to the will of the husband and beyond his control, of which matters he is presumed to be cognizant, and as every devise or bequest imports a bounty, and does

not naturally imply satisfaction of a pre-existing incumbrance, a gift to the wife in the will, is to be taken as a cumulative provision, unless the intent that it shall be in lieu and exclusion of dower, be demonstrated by express declaration, or by clear and manifest implication arising from the instrument's containing some provision incompatible with the right of dower; *Higginbotham v. Cornwell*, 8 Grattan, 83; *Lasher v. Lasher*, 13 Barbour, 106; *Tooke v. Hardeman*, 7 Georgia, 20. To establish such implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. It is not enough that the matter is doubtful, or that the testator did not contemplate that his wife should take both estates: she will not be put to an election, unless it be clear that he distinctly contemplated and designed that she should not enjoy both provisions, or unless he has made such a disposition of his estate, that the assertion of dower would do violence to his will. This is, in substance, the principle established after a careful review of the cases, by Chancellor Kent, in *Adsit v. Adsit*, 2 Johnson's Chancery, 448; and however variously it may have been enforced, it is accepted in the subsequent cases, as the true and sound rule upon the subject. See *Smith v. Kniskern*, 4 Id. 9; *Wood v. Wood*, 5 Paige, 597, 601; *Fuller v. Yates*, 8 Id. 325; *Sanford v. Jackson*, 10 Id. 266; *Havens v. Havens and others*, 1 Sandford, 325, 330; *Bull v. Church*, 5 Hill, 206; S. C., 2 Denio, 430; *Sheldon v. Bliss*, 4 Seldon, 31; *Lewis v. Smith*, 5 Id. 503; *Gordon, Adm'r, v. Stevens*, 2 Hill's

Chancery, 46; *Whilden v. Whilden*, Riley's Chancery, 205; *Brown v. Caldwell*, 1 Spears' Equity, 322; *Timberlake v. Parish's Ex'or*, 5 Dana, 345; *Stark et al. v. Hunton et al.*, Saxton's Chancery, 217, 224, 225; *Kinsey et al. v. Woodward*, 3 Harrington, 459, 464. See also, *Ambler and Wife v. Norton*, 4 Hening & Munford, 23, 44; *Snelgrove et al. v. Snelgrove et al.*, 4 Dessaussure, 274, 294; *Webb v. Evans*, 1 Binney, 565, 572; *Kennedy v. Nedrow*, 1 Dallas, 415, 418; *Hamilton v. Buckwalter*, 2 Yeates, 389, 392, 395; *McCullough and Wife v. Allen and Wife*, 3 Id. 10, 12. And the same rule applies where the testator aliens part of his land during marriage, and gives all his estate, real and personal, to his widow, by devise, at his death; *Braxton v. Freeman*, 6 Richardson's Eq. 35. "The right of dower," said Johnson, Ch., in *Brown v. Caldwell*, 1 Spears' Eq. 322, 325, "is amongst the most favored by the law. It is put on the footing of life and liberty, and in looking through the cases, one is led almost to conclude, that common sense and sound reasoning have been violated in giving it effect. But there is less apparent impropriety in it, when it is recollected with what facility the husband may put his intention beyond all dispute, by declaring that the provision made for the wife was intended to bar her right of dower." This presumption in favor of the testamentary provision being additional to the legal estate of dower, has been carried to the greatest extent in the New York cases. It should be remarked that previously to the case of *Adsit v. Adsit*, the rule as to exclusion of dower had been laid down by Marshall, C. J., in *Herbert*

and others v. Wren and others, 7 Cranch, 370, 378, in a much more moderate form, and made to depend rather upon a fair construction of the whole will, than upon any decided leaning in favor of the two provisions being concurrent; and a similar view was taken in the recent case of *Lord v. Lord*, 23 Conn. 327.

Under the general principle above stated, as to the necessity of election by the wife, between the testamentary provision and dower, some of the applications which have occurred may be stated.

It appears to be agreed, in all the cases, that if a legacy or annuity be given to the wife, and the lands be devised to trustees to be sold, or directed to be sold by executors, for any purpose whatever, the lands continue subject to dower, both in the hands of the trustees, executors or heirs, and in those of a purchaser; *Hall v. Hall*, 8 Richardson, 407; and this, whether the legacy be charged upon the fund arising from the sale of the lands, or be given from some wholly distinct property. This may be considered as established by *Adsit v. Adsit*. There, a testator directed his personal estate and his farm to be sold; and gave his wife a pecuniary legacy to be left in the hands of his executors, to be paid to her, for her support, at any time, or at all times, as her need might require; and gave her also, what household goods she might need, and gave certain legacies to his grand-children, and directed the residue also to be divided among his children and grand-children; and it was decided, that the lands sold were subject to dower in the purchaser's hands: *Adsit v. Adsit*, 2 Johnson's Chancery, 448. The same

point was again decided in *Wood v. Wood*. In that case, a testator had devised all his estate, real and personal, to a trustee to be sold, and directed, that after certain expenses were paid, the interest on one-third of the whole fund should be paid to the widow during her widowhood; and in case of her marriage, one-third of that third. The Chancellor said, "Although the testator directs all his estate to be sold, and one-third of the proceeds to be invested for the use of his wife during her widowhood, it does not appear, by any necessary implication from the will itself, that he intended this provision to be in lieu of dower in the real estate of which he died seised. The widow is not therefore obliged to elect between that provision and her dower. I am satisfied, from an examination of the American, as well as the English cases, that a devise of all the testator's real and personal estate to trustees, to be converted into money, without any particular designation of the real property to be sold, and giving to the widow an annuity or other provision out of such mixed fund, is not, of itself, sufficient to show that the testator intended her interest in the land, as tenant in dower, should be sold as part of the estate; so as to make it necessary for the widow to elect between such dower and the provision contained in the will. The widow in the present case is therefore entitled to both." *Wood v. Wood*, 5 Paige, 597, 601. These were cases, in which the legacy was chargeable upon the lands sold, or was payable out of the proceeds of them. Several cases have decided the same point, where real estate was directed to be sold, and a legacy, or even a devise, unconnected with the estate to

be sold, was given to the wife. In *Timberlake v. Parish's Ex'or*, 5 Dana, 345, a legacy to the wife, and an order to sell all the residue of the estate, real and personal, and distribute it equally among the testator's children, were held not to be a bar to dower in the lands; and the court declared that a provision by will for the wife is not presumed to be in lieu of dower, "unless the intention that it should so operate be expressed, or can be *plainly* inferred, or unless any other interpretation would be inconsistent with the will;" and that "a mere devise of the whole of the testator's remaining estate to others, or to be sold for their benefit, and even for that of the wife also, is not so inconsistent with her legal right to dower," as to make it a provision in lieu of it. In *Whilden v. Whilden*, Riley's Chancery, 205, a testator bequeathed one thousand dollars to his wife, and then directed the whole of his real and personal estate to be sold, and the fund invested for the support of his children during minority, and then divided among them. The legacy was held not to be a bar of dower. "The dower," said Chancellor Desaussure, "is a provision made, by law, for the support of the widow. A legacy is a provision made by affection, for the better support of the wife. There is scarcely any man owning real estate, who does not know, in fact, that his wife is entitled to dower in that estate; and the law implies the knowledge. The presumption, therefore, is, that when a testator bequeaths a legacy to his wife, he intends it as an addition to the legal provision of dower, unless he declares it to be in bar of dower; and she shall be entitled to both. In

some of the books it is said, that where the wife has two provisions, such as a legacy under her husband's will, and her dower, she shall be, in most cases, put to her election. But this is putting it quite too broadly—and I apprehend the true rule to be, that a widow cannot be put to her election, unless by express declaration or necessary inference, arising from the inconsistency of her claim with the provisions of her husband's will. It is not that there is an additional provision made for the wife, by the will of the husband, which deprives her of dower, or puts her to her election, for, in many cases, she is entitled to both. . . . There being no express declaration in the will, we must examine whether the legacy of one thousand dollars to the widow shows such an intent to exclude dower by plain and manifest intent. And, certainly, taken by itself, it does not show such a manifest intent; else, in every case, any legacy to a wife might be said to raise the same implication. But it was urged, that the claim of dower would defeat the other provisions of the will, which direct the sale of the real and personal estate, and the investment of the proceeds, for the support of the children of the testator. It will, certainly, lessen the amount to be invested, so as to form that fund, but it will not defeat the arrangements and dispositions made by the testator. They may, and will, all be carried into effect, diminished only by a small amount which he, himself, carved for his wife. For this direction to sell and invest, is after the legacy of one thousand dollars to the wife, showing that he intended that amount to be first withdrawn from the fund, before

investment. It is not clear of difficulties, but to the best of my judgment, the widow is entitled to her dower and the legacy." On appeal, these views were sustained. See also, to the same effect, *Gordon, Adm'r*, v. *Stevens*, 2 Hill's Chancery, 46. In *Kinsey et al. v. Woodward*, 3 Harrington, 459, the testator bequeathed an annuity to his wife, and directed his executors to sell all his real and personal estate, and divide the proceeds among his daughters, and added, "I do authorize and empower them, (the executors,) to convey to the purchaser of said real estate, a good and sufficient fee simple title or titles, being of equal tenor with those by which I now hold the same;" and it was decided that the intention that the lands should be sold free of dower was not sufficiently clear to put the widow to an election. A strong case, to the same purport, is *Fuller v. Yates*, 8 Paige, 325. There, a testator left his whole real and personal estate to three persons, (of whom his wife, during widowhood, was to be one,) as trustees and executors for the purposes of his will, and directed that they should lay out certain lands into village lots, and sell them, as from time to time might be required; and he directed that an annuity should be paid to the wife during life, and that she should have the possession and direction of certain other real estate, and for the purpose of keeping it in repair, should receive an additional annual sum; and besides all this, gave her sundry other bequests. "The right of dower," said the Chancellor, "being a legal right, the wife cannot be deprived of it by a testamentary disposition in her favor, so as to put her to an election, unless the testator has manifested his

intention to deprive her of dower, either by express words or necessary implication. It is not pretended in this case that the language of the will in respect to the provisions for the wife is at all inconsistent with her claim to dower in the residue of the testator's real estate. The cases on the subject of implied manifestation of intention to exclude the right of dower appear to establish this principle, that to put the wife to her election, the will must contain provisions which are wholly inconsistent with her claim of dower, in the particular portion of the estate to which the claim of dower is made. . . . In the present case, although the testator has expressly directed village lots to be laid out and sold, as they may be wanted, it is not necessary that each lot should be sold subject to the widow's right of dower. For a portion of the lots thus laid out may be assigned to her for her dower in the whole, and the rest may be sold free from any claim of dower. Or she may be endowed of other portions of the real estate, leaving all that is wanted for village lots during her life entirely free and unincumbered. I therefore conclude that, upon the settled principles of law on this subject, the widow is entitled to dower in the testator's real estate, notwithstanding the bequests and devises in her favor in the will. Taking the whole disposition which the testator has made of his property into consideration, it can hardly be said he intended to give her dower in addition to the testamentary dispositions in her favor; and probably if the question of dower had occurred to him, he would have inserted a provision in the will declaring that the dispositions in her

favor should be in lieu of dower in the residue of his estate. But it is not sufficient to bar her dower that he did not think on the subject; as that would only indicate a want of intention either one way or the other. To exclude her right to dower, which is given to her by law, the will itself must show that he probably did contemplate the subject, and intended that the testamentary provisions for the wife should exclude her from all claim to dower, if she elected to take them." In like manner, a devise of the residue of the real and personal estate of the testator to his widow, will not bar her dower in land mortgaged in his lifetime, nor compel her to resign the rights which she would have independently of the devise, as the price of claiming under it. *Lewis v. Smith*, 5 Selden, 503. See, also, *Sample v. Sample et al.*, 2 Yeates, 433. From these cases, the principle may be deduced, that if a legacy or devise, of whatever amount, be given to the wife, and subject to this, the whole real estate, or the residue of the real estate, be directed to be sold, for any purpose, the legacy or devise will not be taken to be in lieu of dower. See, however, the remark of Marshall, C. J., in *Herbert and others v. Wren and others*, 7 Cranch, 370, 379, as to the presumption afforded in such a case, by a direction to sell the residue for the payment of debts. [This remark was cited and relied on in *Norris v. Clark*, 2 Stockton's Ch. 51, and a devise of all the testator's real estate to his executor, with a direction that it should be sold and the proceeds distributed as provided for in the will, held to show that a declaration that the acceptance of a legacy bequeathed to the wife,

should debar her from any further demand on the estate, meant the estate generally, and not merely that portion of it which consisted of personal property.]

If there be a devise or bequest to the widow, and a devise of a general residue of real estate, not to be sold, but to be enjoyed by the devisee, an intent that the provision for the wife shall be in lieu of dower, cannot be implied; *Brown v. Caldwell*, 1 Spears' Equity, 322, 325; *Havens v. Havens and others*, 1 Sandford, 325, 329. "I have not been able to find any case," said Johnson, Ch., in *Brown v. Caldwell*, "in which it has been held, that any general disposition of the estate would raise the implication." And even if the devise is specific, though that naturally imports that the devisee is to take the whole estate, yet, in an ordinary case, as where the devisee is a brother or sister merely, or a child otherwise provided for in the will, the intention to exclude dower will not be inferred; *Straham v. Sutton*, 3 Vesey, 249; *Kennedy v. Nedrow*, 1 Dallas, 415, 418; though there is an intimation to the contrary in *Brown v. Caldwell*. Where, however, after a provision for the wife, there is a specific devise of real estate to a person whom the testator is bound to provide for, and who is obviously intended to be a principal object of the bounty of the will, as where the devise is for the support of an infant child, otherwise unprovided for, and is not more than sufficient for that purpose, the intention that the bounty to the child should not be invaded and impaired by a claim of dower may very fairly and reasonably be implied. And the case of *Herbert and others v. Wren and others*, 7 Cranch, 370, 378, appears to

be an authority for that principle. There, a testator devised to his wife certain real estate for life, with remainder to his three daughters, and also bequeathed to her personal estate: he then devised to his two sons the premises in which dower was claimed, which were then under lease at an annual rent of £140, and directed this rent to be appropriated to the education and maintenance of his children; and other lands he ordered to be sold for the payment of debts. "The only fund provided for the maintenance and education of his five children," said Marshall, C. J., in delivering judgment, "is the rent of £140 per annum. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower." Upon this, and some other less important grounds, a majority of the Court were of opinion that the testator intended the provision for the wife to be in lieu of dower.

Another case, under this perplexing subject, is where real estate is devised to a particular person, charged with an annuity in favor of the widow. Something may depend upon the extent to which the devisee is apparently the object of the testator's bounty, and in connection with that, upon the apparent sufficiency of the devised estate, in the view of the testator, to raise the annuity and dower, and also leave a beneficial interest in the devisee. But the distinction upon which, really, the cases have gone, both in England and in this country, is, between a rent-charge, or an annuity in the nature of a rent-charge, issuing out of the specific land in which dower is claimed, and chargeable upon no other fund, and

an annuity, which, though chargeable on the land, is primarily payable out of some other fund. The English cases are to be reconciled upon this difference: that a rent-charge, or an annual sum payable to the wife out of the particular land, and out of nothing else, is necessarily repugnant to the enjoyment of dower in that land, upon the ground stated by Lord Camden in his very able judgment in *Villa Real v. Lord Galway*, 1 Bro. C. C. 292, n., that an entry upon the land, as dower, necessarily extinguishes the rent-charge, at least *pro tanto*: but if the annuity, though chargeable on the dower land, is payable also out of other funds, and especially if it is payable also out of personal estate, which then becomes the primary fund—in other words, if it be not a rent-charge, but properly an annuity—there is no such inherent and necessary repugnancy between the enjoyment of that annuity and the assertion of dower, as to put the widow to an election. All the cases in which the annuity has been held to be in lieu of dower, were cases in which it was, in fact, a rent-charge, and payable out of no other fund than that land in which dower was claimed. Those cases are *Arnold v. Kempstead*, Ambler, 466; S. C., 2 Eden, 236; *Villa Real v. Lord Galway*, 1 Bro. C. C. 292, n.; S. C., Ambler, 682; *Jones v. Collin*, Ambler, 730; *Wake v. Wake*, 3 Bro. C. C. 255. On the other hand, where the provision for the wife is payable out of other funds also, especially if out of personal estate, in which case it is strictly an annuity, and not a rent-charge, the cases have held that dower is not barred. The first case is *Pitts v. Snowden*; of which the only report is the following note in 1 Bro.

C. C. 292, n.—“Devise to his wife of an annuity of £50 a year, payable out of his *copyhold* and his freehold messuages, with clause of entry and distress, to be made good out of his *personal estate*. And, subject to the annuity, he gave his freehold messuages to his three children.” Lord Hardwicke determined the widow to be entitled to both the dower and the annuity. Here, not only were the copyholds liable, in addition to the freeholds, and perhaps primarily liable, but the annuity was chargeable also on the personal estate; so that the reasoning of Lord Camden, in *Mr. Villa Real’s case* had no application, since if the widow’s entry on the freeholds had interrupted her dower, it would have been made good out of the *personal estate*. In *Foster v. Cook*, 3 Bro. C. C. 347, the annuity was payable out of real and personal estate, devised to trustees, so that the personal estate was liable in the first instance. In *French v. Davis*, 2 Vesey, Jr., 572, the annuity was payable out of a fund composed of the produce of the real and personal estates mixed together. *Greator v. Cary*, 6 Id. 615, is the same case as *Foster v. Cook*, and decided upon it. In *Strahan v. Sutton*, 3 Id. 249, the annuity was payable only out of personalty. There is, therefore, perhaps, no such contradiction between Lord Hardwicke’s and Lord Thurlow’s decisions on the one hand, and those of Lord Camden, Lord Northington and Mr. Justice Buller, on the other, as is supposed by Chancellor Kent in *Adsit v. Adsit*, and by some other writers. The late English cases carry out the same distinction. On the one hand, in *Holdich v. Holdich*, 2 Young & Collier’s C. C. 18, the be-

quest was of an annuity charged generally with other legacies upon both real and personal estate, and therefore payable primarily out of the personalty. In *Dowson v. Bell*, 1 Keen, 761, though the freeholds were devised subject to the annuity, copyholds were clearly intended to be the primary fund for its payment. On the other hand, in *Roadley v. Dixon*, 3 Russell, 192, the annuity was “to be issuing out of the estate at S.,” and was therefore a rent-charge strictly, payable out of that land only: and the remarks of Lord Lyndhurst in that case tend decidedly to sustain Lord Camden’s view in *Villa Real v. Lord Galway*. *Norcott v. Gordon*, 14 Simon, 258, does not overrule *Arnold v. Kempstead*, nor concern the same point. *Harrison v. Harrison*, 1 Keen, 765, belongs to a different class of cases; there, the provision for the wife was neither a rent-charge, nor an annuity charged on land; lands were devised to trustees to pay an annuity out of the rents and profits; and of course the considerations in *Villa Real’s case* did not apply. The cases in this country support the distinction above mentioned; that an annual provision for the widow, payable out of personal and real estate, is not a bar to dower in that real estate, but such a provision issuing out of the real estate only, is: see *Lord v. Lord*, 23 Conn. 327. The former point is decided in *Smith v. Kniskern*, 4 Johnson’s Chancery, 9. There, a testator possessed of real and personal estate, gave his wife several legacies, “and her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors, and the privilege and use of one room in his dwelling-house

during all such time as she should continue to be his widow, and no longer;" and after giving other legacies, left the residue of his estate to his two daughters. "The charge of a 'comfortable support and maintenance' falls, probably, upon the real estate as well as the personal," said the Chancellor. "But the latter ought to be first applied; and as the executors were directed to render the maintenance from time to time, and as no authority is given to them over the real estate, it would seem that the testator had a particular reference to the personal estate, in making that provision for his wife. I do not perceive, however, that the provision destroys the right to dower. There is no inconsistency between the two claims, even supposing the charge for maintenance to rest upon the real estate. From the large and valuable real estate set forth in the pleadings, and admitted, it is quite apparent that the real estate is much more than adequate to furnish the support and the dower. There is nothing repugnant in the operation of the two claims; and the assertion of the right of dower will not disturb or defeat any provision in the will. . . . The rule is, that the widow takes both provisions, unless the estate is insufficient to support both, or such an inconsistency appears between the provisions in the will, and the dower, as to make the intention clear and indubitable, that both provisions were not to be taken." The other branch of the distinction is established in *White v. White*, 1 Harrison, 202, 211. The testator, in that case, bequeathed to his wife all the property which she had before marriage, and further ordered that she should have one room in his dwelling-

house, "and a comfortable maintenance *out of his real estate*, during her natural life or widowhood:" and then devised his real estate to his two sons. It was decided that the maintenance was intended to be in lieu of dower. "If the demandant shall be allowed to recover dower in the real estate," said Ford, J., in delivering the opinion of the court, "it will disturb and prevent the testator's own provisions from being carried into effect. He has provided for her a comfortable maintenance, and has made it a charge upon his whole real estate, so that it goes with the estate as a burden, into the hands of his two sons: they are to furnish the maintenance, and in consideration of it they are to have the *whole* estate. Now, if the widow takes one-third of it for her dower, and they obtain only *two-thirds* of it during her lifetime, it wholly deranges the testator's settlement, which was that they should have the whole estate, and be liable in respect of it, for the whole of her maintenance. The will can never be executed according to his intent, for the sons will have only two-thirds of what the testator intended; and the uttermost for the widow would be only two-thirds of the maintenance provided and intended for her. The testator's settlement would be broken up, and some other would have to be substituted in the place of it. Either the widow must lose her whole maintenance, or it must be apportioned on the sons according to the proportional part of the lands they obtain. If she, by an act of her own, takes one-third of the land away from her sons, does she not discharge them from any maintenance?" "If a man having a rent-charge, purchases *part of the land*, out of which the rent issues, the whole

rent is thereby extinguished, because wilfully and by his own act, he has prevented the operation of the charge on the land, *according to the original grant.*" Litt. sec. 222; Gilb. on Rents, 152. If so, her claim of dower contravenes the will by defeating the very maintenance the testator has provided for her. If it be said that dower accrues by operation of law, not by her own act, and therefore that the charge shall not be entirely lost, but apportioned on the sons, according to the estate they actually receive, even this will defeat the disposition made by the testator, according to which the sons were to have all the land, and to furnish the whole of the maintenance. This is quite the reasoning of Lord Camden, in his judgment in *Villa Real's case*. In *Addams v. Heffernan*, 9 Watts, 530, 541, it was decided that if a rent-charge or rent-seck, or annuity payable out of land, be given to one upon whom in common with others the land descends as heirs-at-law, the rent or annuity is extinguished *pro tanto* as the annuitant took as heir-at-law. In further support of this principle, the case of *Duncan v. Duncan's Ex'rs*, 2 Yeates, 302, may be referred to. Here a testator directed that all his estate both real and personal should be sold to the best advantage, as soon as convenient, and gave to his wife the interest of one-third part of the price of his real estate when sold, for her support during her natural life; and it was held that the widow was put to her election. The court said, "Though the devise to the widow is not expressed 'to be in lieu and satisfaction of dower,' yet it is absolutely inconsistent with and repugnant to such claim. Ambl. 467, 682, 730. She could not possibly

have the interest of one-third of the amount of sales of the whole land during her life, and at the same time hold one-third part of it *unsold* for her benefit." In like manner, a devise of all the testator's real and personal property to trustees, with directions to pay two-thirds of the rents and profits to his children, and the remaining third to his widow during her life, followed by a direction that the real estate should be sold after her demise, was held, in *Savage v. Burnham*, 17 New York R. 562, to debar the right of dower, by making a disposition inconsistent with its enjoyment.

A devise to the widow, of an estate for life in certain property, and of the residue of the real estate to others, will not, by implication, exclude her from dower in the residue; *Havens v. Havens and others*, 1 Sandford, 325. But upon the question whether a devise to her for life, or during widowhood, in particular lands, or in all the testator's real estate, will exclude dower in the same lands in which she has the devise for life or during widowhood, the decisions are in conflict. In New York, it has been decided that a devise of all the testator's property, real and personal, during widowhood, or during widowhood and the minority of the children, and then to be divided among the children, is not a devise in lieu of dower, so clearly as to put the wife to an election; *Sandford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 5 Hill, 206; S. C., affirmed on error, *Church v. Bull*, 2 Denio, 430. In some other States, however, the decisions have been the other way: and it is held that a devise to the wife during widowhood, or during life, is an implied exclusion of dower in the same lands, because the two estates

cannot exist together; especially if coupled with a direction that upon her re-marriage, all her interest in the testator's estate shall cease; *Wilson, Ex'r, v. Hayne et ux.*, Cheves' Equity, 37, 40; *Caston v. Caston*, 2 Richardson's Equity, 1, 2; *Cunningham v. Shannon*, 4 Id. 135; *Stark et al. v. Hunton et al.*, Saxton's Chancery, 217, 224, 225; *Hamilton v. Buckwalter*, 2 Yeates, 389, 392; *Crea-craft and Wife v. Dille*, 3 Id. 79; see, however, *Evans v. Webb*, 1 Yeates, 424; 1 Binney, 565; *McCullough and Wife v. Allen and Wife*, 3 Yeates, 10; *Chappel v. Avery*, 6 Connecticut, 31.

The principles relating to a testamentary provision being in lieu of dower, and to the widow's election between such a provision and dower, appear to be in all respects the same at law as in equity. See *Van Orden v. Van Orden*, 10 Johnson, 30, 32; *Jackson v. Churchill*, 7 Cowen, 287; *Bull v. Church*, 5 Hill, 206; S. C., affirmed on error, 2 Denio, 430; *Pickett v. Peay*, 3 Brevard, 545. It was said, indeed, by Thompson, J., in *Larrabee and Wife v. Van Alstyne*, 1 Johnson, 307, 308, that to render a provision for the wife by will, a *legal bar* of dower, it must consist of lands given or assured to her for life, and that a sum of money or other chattel interest, given by will, in lieu of dower, will, if accepted, be only an equitable bar: see also *Jones v. Powell*, 6 Johnson's Chancery, 194, 200; but this distinction is now exploded, and it is held that any testamentary provision, clearly intended to be in lieu of dower, if accepted deliberately, and understandingly, will be a bar, at law, to claim for dower; *Kennedy v. Mills*, 13 Wendell, 553; *Davison v. Davi-*

son, 3 Green, 235. Statutory provisions in respect to the relation between dower and a testamentary devise or bequest to the widow, have been introduced into the law of several of the States. In North Carolina, and Tennessee, any provision for the widow in the will bars her of dower, unless within a certain time she dissents from the will; see *Craven v. Craven*, 2 Devereux, Equity, 338; *Bray v. Lamb*, Id. 372; *Reid v. Campbell*, Meigs, 378; *McDaniel v. Douglas*, 6 Humphreys, 220. In Massachusetts, Maine, Ohio, and Alabama, any testamentary provision is a bar to dower, unless the widow elect within six months after probate to waive it and be endowed, or unless it plainly appear by the will that the testator intended that she should have both; see *Reed v. Dickerman*, 12 Pickering, 146; *Crane v. Crane*, 17 Id. 422; *Delay v. Vinal*, 1 Metcalf, 57; *Adams v. Adams and others*, 5 Id. 277; *Pratt v. Fulton*, 4 Cushing, 174; *Allen v. Pray*, 3 Fairfield, 138; *Hastings v. Clifford*, 32 Maine, 132; *Stilley et ux. v. Folger et al.*, 14 Ohio, 610, 646; *Hilliard v. Binford*, 10 Alabama, 977. In New Jersey, any devise of real estate to the widow, without a declaration as to whether it is in lieu of dower, or not, is made a bar, unless dissented from within six months after probate; see *Thompson v. Egbert*, 2 Harrison, 460; *Stark et al. v. Hunton et al.*, Saxton's Chancery, 217, 228. In Delaware, any devise, and in Pennsylvania and Maryland, any devise or bequest, will be taken to be in lieu of dower, unless the testator declare otherwise, the widow still having her election; Penna. Act of 8th April, 1833, sect. 11, (Purd. 1169;) and of March 29,

1832, sect. 35, (Purd. 892;) *Reed v. Reed*, 9 Watts, 263; *Chandler v. Woodward*, 3 Harrington, 428; *Col-lins v. Carman*, 5 Maryland, 503. In New York, by the revised statutes, if any provision, real or personal, is made for a widow by will, in lieu of dower, she must elect; and will be taken to have elected against dower, unless within one year she enter on the lands to be assigned for dower, or commence proceedings for the recovery of assignment thereof. 1 R. S. 741, ss. 13, 14; see *Hawly v. James*, 5 Paige, 323, 445.

A bequest in lieu of dower, accepted by election, is so far based upon a valuable consideration, that, though subject to the demands of creditors, it has priority over other legacies, and will not abate with them; *Isenhardt v. Brown*, 1 Edwards, 411; *Reed v. Reed*, 9 Watts, 263; *Lord v. Lord*, 23 Conn. 327.

An election may be determined by matter *in pais* as well as by matter of record; but it can only be by plain and unequivocal acts, under a full knowledge of all the circumstances, and of the party's rights; and a bare acquiescence, without a deliberate and intelligent choice, will not be an election; *Duncan v. Duncan's Executors*, 2 Yeates, 302, 305; *Cauffman v. Cauffman*, 17 Sergeant and Rawle, 16, 25; *Heron v. Hoffner and others*, 3 Rawle, 393, 396; *Adlum v. Yard*, 1 Id. 163, 171; *O'Driscoll v. Koger*, 2 Dessausure, 295, 299; *Snelgrove et al. v. Snelgrove et al.*, 4 Id. 274, 300. It is a general rule, that one is not bound to elect, until he is fully informed of the relative value of the things he is to choose between; and if he make an election before the circumstances necessary to

a judicious and discriminating choice are ascertained, he will not be bound; *Pinckney v. Pinckney*, 2 Richardson's Equity, 219, 237; *Upshaw v. Upshaw and others*, 2 Hening and Munford, 381, 390, 393. "The cases have gone so far," said the Chancellor, in *Hall v. Hall*, 2 M'Cord's Chancery, 269, 280, "that after the wife has made her election, and has received benefits under the will, she has been allowed to retract and resort to her legal rights, when the estate has turned out differently from what it was believed and stated to be at the time of the election prematurely made:" and this was held to be allowable in *Adsit v. Adsit*, 2 Johnson's Chancery, 448, 451. Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it, for a long period of time, will amount to a binding election to confirm the instrument: *Upshaw v. Upshaw and others*; *Wilson, Ex'r, v. Hayne et ux.*, Cheves' Equity, 37, 42; *Caston v. Caston*, 2 Richardson's Equity, 1, 2; *Stark et al. v. Hunton et al.*, Saxton's Chancery, 217, 227; *Clay and Craig v. Hart*, 7 Dana, 1, 6. In like manner, if a legatee's real estate is devised away, his recovering that estate, by proceedings in law or equity, by title paramount to the will, would be an election not to take under the will; *Kinnaird, Ex'or, &c., v. Williams's Adm'r et al.*, 8 Leigh, 400. If a party has once made an election, he is bound to abide by his determination, unless he can restore the property to its original situation; *Leonard v. Crommelin*, 1 Edwards, 206, 210.

There are cases of election in other departments of equity, where infants and *femes covert* cannot make a bind-

ing decision; but they may be enforced to elect, in cases of the present nature, where the choice lies between two inconsistent rights, and there is a clear intention on the part of him under whom one of them is derived, that both shall not be enjoyed, and it is therefore against conscience to retain both; *Robertson v. Stephens*, 1 Iredell's Equity, 247, 251; *M^cQueen v. M^cQueen*, 2 Jones' Eq. 16: see *Tiernan et al. v. Roland and Blackstone*, 3 Harris, 430, 451. The court will make election for infants; and, in

doing so, will be guided altogether by a view to the benefit of the infant, on a consideration of all the circumstances; *Addison v. Bowie*, 2 Bland, 606, 623. The proper course, therefore, under such circumstances, lies in a reference to a Master, to ascertain the value of both interests, followed by a decree that the infant shall retain that which will, on the whole, be most for his advantage, and resign all claim to the other. *Grattan v. Howard*, 1 Swan, 409; *M^cQueen v. M^cQueen*, 2 Jones' Eq. 16.

FRAUDS ON POWERS.

[*304]

**ALEYN v. BELCHIER.*

JULY 5, 1758.

REPORTED 1 EDEN, 132.¹

FRAUD UPON A POWER.]—*Power of jointuring executed in favor of a wife, but with an agreement that the wife should only receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts: held a fraud upon the power, and the execution set aside, except so far as related to the annuity; the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.*

THE Rev. Thomas Aleyn being seised of a real estate in Essex, of the yearly value of £540, subject to a mortgage for a term of 500 years to Sir Charles Palmer for £500, and having a nephew, Edmund Aleyn, and two brothers, the plaintiff, Giles Aleyn, and William, who was a defendant, by his will, bearing date the 28th of May, 1746, devised the same to Eyre and Bragg in trust by sale or mortgage to raise money, and pay his debts and legacies, and to permit his wife to receive the rents and profits of the residue for her life, and after her death in trust to convey to his nephew Edmund for life, with remainder to his first and other sons in tail male, with proper limitation to support contingent remainders, with a power to his nephew to make a jointure on any woman he should then after marry, for her life, in bar of dower, with powers to provide for younger children, and to make leases, with remainder to

¹ S. C., Sudg. on Pow., App. Amb. MSS. Reg. Lib. A. 1757, fol. 432.

the testator's brother Giles for life; remainder to his first and other sons in tail male; remainder to his brother William for life; remainder to his first and other sons in tail male; remainder to his *own right heirs: he gave his brother, the plaintiff, an annuity of £30 a year for his life, [*305] to be paid out of his estate, to be increased to £50 a year in case his nephew should survive his, the testator's, wife.

A bill was filed soon after the testator's death by the widow, and on the 14th of February, 1749, a decree made to establish the will, and for payment of debts and legacies by mortgage or sale in the usual way. The master reported, there was due for debts and legacies, 1516*l.* 1*s.* 10*d.*, which he approved to be raised by mortgage. The widow died in April, 1750, and Edmund became entitled to the possession of the estate. The defendant, William Belchier, having advanced money to pay off the encumbrances, a mortgage, bearing date the 26th and 27th of June, 1750, was made of the estate to him in fee, and the term for years was assigned to John Belchier in trust for W. Belchier.

Edmund was very extravagant, and became indebted to William Belchier in the sum of £1760.

On the 4th of June, 1750, Edmund married the defendant Jane, who was a low woman without fortune, and no provision for her was either made or agreed to be made; but, soon after the marriage, by articles of agreement, bearing date the 1st of August, 1750, and made between Edmund Aleyn and his wife of the one part, and William Belchier of the other, reciting the will of Thomas Aleyn, giving Edmund a power of jointuring, and that he and Jane were lately married, and that he was indebted to William Belchier in the sum of £1760, besides the mortgage, Edmund Aleyn, in satisfaction and discharge of the said sum of £1760, and in consideration of the several annuities and money thereafter agreed to be paid, covenanted within six months to procure an effectual conveyance and settlement to be made by the trustees in Thomas Aleyn's will, and immediately after such settlement should be made, to appoint the whole estate to his wife for her life, in case she should survive him, for her jointure; and that he and his wife, as soon as they should become respectively seised of the legal estate of freehold, *would, by fine and conveyances, convey and assure all the said premises by the [*306] said will devised and intended to be settled, unto and to the use of William Belchier, his heirs and assigns, during the lives of Edmund Aleyn and Jane his wife, and the longer liver of them; and in consideration thereof, William Belchier covenanted that, in case the said settlement should be perfected, whereby the estate should become well vested in him and his heirs, for the lives of Edmund and Jane his wife, and the longer liver of them, to pay the several annuities after mentioned, namely: to Jane Aleyn, during the lives of her and Edmund her husband, £60 a year, clear of all deductions, for her separate use; to Edmund, for his life, in case he should survive Jane, £100 a year, clear of all deductions; and to Jane, in case she should survive Edmund her husband, for her life, £100 a year, clear of all deductions; and to pay to John Miles, son of Jane by a former husband,

£105 at the age of twenty-one years; and also to pay Jane £5 yearly towards his maintenance and education, till the £105 should become payable.

The estate was conveyed by lease and release of 6th and 7th of August, 1750, to the uses of Thomas Aleyn's will, pursuant to the decree; and by deed, dated 8th August, 1750, reciting the conveyance and power to jointure, Edmund Aleyn, in consideration of the marriage, and in order to make a provision for Jane, his wife, appointed the whole estate to Jane, his wife, for a jointure, subject to the payment of the annuities given by the will of Thomas Aleyn, and of the mortgage of 1516*l.* 1*s.* 10*d.* and interest.

On the 10th of August, 1750, Edmund Aleyn and Jane, his wife, executed a deed, by which Edmund covenanted with George Townsend, that he and his wife would levy a fine of the premises to Townsend and his heirs, for and during the lives of Edmund and his wife, and the longer liver of them, in trust for William Belchier and his heirs, which was levied accordingly.

[*307] William Belchier took possession of the estate, and *received the rents and profits, and paid the plaintiff, during Edmund's life, two sums of £25 and 21*l.* 5*s.*, in part of the annuity he was entitled to under Thomas Aleyn's will.

Edmund died in June, 1755.

On 26th November, 1756, the plaintiff filed the present bill to redeem the estate, on payment of 1516*l.* 1*s.* 10*d.*, the mortgage money borrowed under the decree, and to be let into the possession of the estate; for an account of the rents and profits from the death of Edmund, submitting to pay Jane £100 a year for her life, and to have the deeds and writings of the estate delivered up.

Jane Aleyn and William Belchier admitted, in their several answers, the facts as before stated. Jane Aleyn said, that the settlement was intended to make a reasonable provision for her, and to save Edmund from ruin; and that if Edmund had not been in debt at the time of their marriage, he would have settled the whole estate on her for her jointure. William Belchier said, that the consideration of the settlement and conveyance was truly and bona fide advanced, part before the execution of the settlement, and the remainder at or about the time of the execution of the settlement and conveyance to Townsend; and they both admitted that Edmund was, at the time of the settlement, in distressed circumstances, and in want of money.

Mr. Perrot and Mr. Ambler, for the plaintiff:—This is an improper execution of the power, which was to bar dower by giving a jointure; but even supposing it well executed, the fraud will vitiate it. The appointment and conveyance were a deceit upon the testator, and a fraud upon the remainderman. The power given to the nephew, who was only tenant for life, was to make a fair jointure, to encourage him to marry, not to pay his debts. The jointure was made. It must not be kept out of the estate in case a fair and honest woman, of no fortune. There is no settlement, nor agreement for one, at the

time of the marriage, nor *till Belchier put it into Edmund's head, [*308] with a view to secure his own debt by taking an absolute interest in the estate for two lives, instead of a mortgage for Edmund's life only. It is at best an unreasonable bargain. The articles of the 1st August discover the whole scheme. Upon the face of them it appears it was not the intention to jointure, but to pay debts. The only jointure averred, is £100 a year; Edmund is stripped of everything during the joint lives of himself and his wife; only £60 a year to be paid during their joint lives, and that to the separate use of the wife. Suppose a power to make a jointure of so much for every thousand pounds fortune: it has been repeatedly held, that if the husband or others advance a sum of money, colorably to authorize the husband to settle largely, a court of equity will set aside all above the proportion of the real value of the fortune.¹ So, if a father, having a power to appoint amongst his children, bargains with one for a share, equity will set it aside. Though it may be honest in Edmund to pay his debts, it must be done with his own money; this is a method of doing it with other persons' money, contrary to the intention of the testator. Even admitting the estate had been fairly and bona fide appointed as a jointure, and the wife had afterwards parted with her jointure, or part of it, to pay her husband's debts, it would have been good to bind the remainderman; yet in this case the whole is one transaction, a collusion between the husband and wife and Belchier. The case of *Lane v. Page*, determined by Lord Hardwicke, is precisely in point.

The Attorney-General, Sir *Charles Pratt*, and the Solicitor-General, the Hon. *Charles Yorke*, for the defendant Belchier; *Clark*, for the jointress:—

The first question is, as to the extent of the power given by the will. The objection that the power is only to bar dower, and consequently can only comprehend jointures made before marriage, is too extensive, as it will comprehend every jointure, though made bona fide. The devise is to a nephew, having no estate of his own, for life, without impeachment of waste; he had no estate to *which dower could attach, which shows that the words [*309] were put in by the scrivener currente calamo.

As to the execution, the power was substantially executed; the husband and wife agreed to sell their interest to Belchier. If an appointment had been made of the whole estate, and the wife had afterwards joined with the husband and sold her interest, it would have been good if only a day had intervened. This is the same thing. Suppose the wife had made a stand after the power was executed, the Court would not have compelled her to levy a fine. It was in her power to do it or not. In the case put, of a father appointing to a child, making himself a partaker, the appointment would only be avoided as against other children, not against a remainderman.

The LORD KEEPER, HENLEY.²—The question is, whether Edmund Aleyn has properly executed the power as a jointure, and has properly conveyed to the defendant, Belchier, or whether the transaction is void in toto, or in part.

¹ *Lane v. Page*, Amb. 233; *Lord Tyrconnel v. Duke of Ancaster*, Amb. 237.

² Afterwards Lord Chancellor, and Earl of Northington.

I am inclined to think the power was not well executed in point of law.¹ It ought to have been before marriage. The power is given under restrictions. It must be a jointure in bar of dower, which can only be before marriage. Dower is not barrable by a jointure after marriage. But, I build my opinion upon the next question.

The whole transaction is on agreement between the husband and wife. No point is better established than that *a person having a power must execute it bona fide for the end designed, otherwise it is corrupt and void*. The power here was intended for a jointure, not to pay the husband's debts. The motive that induced Edmund to execute it was not a provision for his wife. This case is not distinguishable from the cases alluded to, nor from *Lane v. Page*. If a father has a power to appoint amongst children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void. It was admitted the execution would be void, but it was said to be only so amongst the children. In that case the money is to go to the children: no other person has any interest in it; here the remainderman has an immediate [*310] right to the estate after the death of Edmund, if there is no appointment. It was said to differ from the case of parent and children; and that, if the husband had fairly executed the power, the wife might have immediately afterwards joined in a fine to pay his debts. The reason is plain: she would then have had a first interest, and the husband would have had no control over it; but it does not from thence follow that they might make an agreement to divide the money between them. It cannot be supposed he would have settled the whole on her without some such view. She was of no family and had no fortune. It would have kept the children, if they had any, entirely out of the estate till her death. It is like the case put, of parents and children; and I think *Lane v. Page* is in point, and ought to govern my decision in the present case.

Declare the appointment good as to the £100 only, for the benefit of Jane. The plaintiff to redeem, on payment of principal and interest of the mortgage and costs, so far as relates to the mortgage. Account of rents and profits from the death of Edmund; and Belchier to pay the rest of the costs.

Aleyn v. Belchier was decided upon the well-established principle that a person having a power, *must execute it bona fide for the end designed*, otherwise the appointment, although unimpeachable at law, will be held corrupt and void in equity; for, although the Lord Keeper seemed inclined to think, that the power was not well executed, even at law, he founded his decision expressly upon the ground that the appointment was a fraud upon the donor of the power, and therefore void in equity. Upon the same principle, where a man has a power to make a jointure under restrictions, as £100 a year for every £1000 of the wife's portion, and he has himself advanced a sum of money, in order colorably to enable him to make the jointure larger, the Court

¹ Sed vide 2 Sugd. Pow. 321.

will reject such part as is more than proportionate to the real fortune : *Lane v. Page*, Amb. 234, per Lord Hardwicke ; *Lord Tyrconnel v. Duke of Ancaster*, Amb. 237 ; S. C., 2 Ves. 500 ; where the judgment is more fully reported ; and see *Weir v. Chamley*, 1 Ir. Ch. Rep. 295, 317. In *Lane v. Page*, Amb. 233, a tenant for life, with power of jointuring, being greatly in debt, and actually arrested, executed his power of *jointuring to its full extent, [*311] having previously entered into an agreement with the woman whom he afterwards married, that she was to join in levying a fine, the use of which was to pay her £20 a year only for her benefit ; £50 a year was to be applied in payment of his debts, and then to his wife for life ; and the residue of the profits during her life should, after his death, be paid as he should appoint, or, in default of appointment, should go to his executors, administrators, and assigns. The husband died soon after the marriage, no fine having been levied ; but the widow, by indentures of lease and release, conveyed the premises, in trust to pay £20 a year to herself for life, the overplus of the rents in discharge of her husband's debts, and then in trust for herself for life. Upon a bill being filed by the remainderman to set aside this execution of the power, Lord Hardwicke held, that it was a fraud on the property of a third person, the remainderman, but that it ought to be supported as to the £20 a year. "Fraud," he observed, "will affect only so far as it extends ; and this Court will not say that participes criminis shall have no benefit of the agreement in any part." And, accordingly, it was declared that the agreement and conveyance ought to be considered as one transaction, and set aside, except as to the £20 to the wife.

So an appointment to a child by a father in consideration of his wife postponing her jointure to some mortgages which he proposed to effect, was held by Sir W. Page Wood, V. C., to be void. "I think," said his Honor, "it would be impossible to contend if a direct bribe were given to the appointor, though out of a separate fund, that the appointment could be upheld in favor of the party to whom the fund subject to the appointment was given : " *Rowley v. Rowley*, Kay, 242.

Upon the same principle, also, if a parent, having a power of appointment amongst his children, appoints to one or more of them, to the exclusion of the others, upon a bargain for his own advantage, equity will relieve against the appointment as a fraud upon the power. See *Daubeney v. Cockburn*, 1 Mer. 626, where there was a secret understanding that the child should assign a part of the fund to a stranger ; and *Farmer v. Martin*, 2 Sim. 502, where an appointment was made to one of the children in consideration of her having agreed, out of part of the sum appointed, to pay her father's debts : *Thomson v. Simpson*, 2 D. & W. 459 ; 8 Ir. Eq. Rep. 55, 59 ; *Askham v. Barker*, 12 Beav. 499 ; *Conolly v. McDermott*, Beat. 601, Sugd. Prop. 513 ; *Jackson v. Jackson*, Dru. 91 ; 7 C. & F. 977. In *Arnold v. Hardwicke*, 7 Sim. 343, Sir L. Shadwell, V. C., even held that an *antecedent bargain between a [*312] father and two of his children, that if the appointment were made in their favor they would lend the fund to their father, would vitiate the appointment.

In *Salmon v. Gibbs*, (3 De G. & Sm. 343,) the donee of a power of appointment among his children, to whom it was given in default of appointment, had only two daughters, and appointed nearly the whole of the fund to one of them, who was unmarried, on an understanding, but without any positive agreement, that the appointee would re-settle one moiety of it on trust for the separate use of the other daughter, who was married, exclusively of her husband, and after her death on trust for her children. A re-settlement was accordingly made without the privity of the married daughter, who did not hear of the transaction until several years after. It was held by Sir J. L. Knight Bruce, V. C., on the suit of her husband, that the appointment was invalid, and a settlement was directed to be made of his wife's share.

Although questions of this nature generally arise upon a fraudulent arrangement between husband and wife, or between parent and child, the interference of equity is by no means confined to cases in which the donee and object of the power stand in that relation towards each other; for an arrangement between any person having a power, even although he may have been by a voluntary deed the original donor of the power, and any of the objects of it, in fraud of the original intention with which the power was created, will render an appointment void in equity. Thus, in *Lee v. Fernie*, 1 Beav. 483, A. B., being desirous of settling property on the female descendants then in existence of C. D., by a voluntary deed reciting this desire, and that certain persons therein named were the only descendants then living of C. D., settled a part of the property on the persons so named, and reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons. A. B. afterwards discovered that there were other descendants in existence, of C. D., who had been omitted, and to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered of the amount when received. Lord Langdale, M. R., held, that the appointment was void. "It certainly seems," said his Lordship, "a hard thing that he, the author of this gift, and the owner of this property, could not do this; but he had declared a trust—he had said that it should belong to certain persons—that the power he had re-
[*313] served should be exercised for the benefit of certain persons only; and I quite agree with those who advised him, that it was not competent for him, of his own authority, to alter that destination of his property."

As in all other cases imputing fraud, the burthen of proof lies on the person who seeks to set aside an appointment as fraudulent. Thus in *Campbell v. Home*, 1 Y. & C. C. C. 664, where a lady who had a life interest in a fund, with power to appoint to one or more of her children, exclusively of the others, appointed the whole to one child, who had attained the age of twenty-one, and assigned her life interest to such child, one of the trustees refused to join in the transfer to the daughter. Sir J. L. Knight Bruce, V. C., upon a bill being filed against the trustee by the daughter, held that he was bound to join in the transfer. "What may be the intention," said his Honor, "of this lady in regard to the disposition of her money, is not a question with

which the Court has to deal. If it can even be shown that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside." So in *Askham v. Barker*, 17 Beav. 37, a tenant for life had the power of appointing the settled property amongst such of his children as he should think fit. The trustees had in breach of trust lent him part of the trust moneys, without taking any security. Afterwards the tenant for life appointed to his daughters the money so lent, and £500 in exclusion of his son. Contemporaneously the daughters exchanged the sum so appointed for an estate of the father, and then the old trustee retired. Sir John Romilly, M. R., held that there was no fraud on the power, as the estate was worth the amount given in exchange. See also *M^cQueen v. Farquhar*, 11 Ves. 467; *Green v. Pulsford*, 2 Beav. 70; *Mills v. Spear*, 3 Ir. Ch. Rep. 304. *

A question sometimes arises, whether a fraudulent arrangement as to part of the property appointed vitiates the appointment in toto, or such part merely to which the fraud extends. In *Daubeney v. Cockburn*, 1 Mer. 626, this question was fully considered. In that case there was a voluntary settlement of personal property, in trust for such one or more of his children as the settlor should appoint. He appointed to one child exclusively, upon a secret understanding that she should assign a part of the fund to or in favor of a stranger. It was contended, upon the authority of *Lane v. Page*, and the principal case, that the appointment was only void as to the part of the fund agreed by the daughter to be assigned. However, Sir W. Grant, M. R., held the appointment void in toto. "Upon principle," said his Honor, "I do not see how any part of a fraudulent agreement *can be supported, *except where some consideration has been given that cannot be restored; and* [*314] *it has, consequently, become impossible to rescind the transaction in toto, and to replace the parties in the same situation.*"

"In the case of *Lane v. Page*, the subsequent marriage formed such a consideration on the part of the wife. In the case of *Aleyn v. Belchier*, where the appointment was subsequent to the marriage, it can hardly be said to have been decided that the appointment was good in any part. For it appears, by the Register's book, that the bill contained a submission to pay the annuity to the wife, and only sought relief against the other objects of the appointment."

"In ordinary cases of fraud the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud. But, in such a case as the present, the appointment of any particular proportion to any particular child, is a purely voluntary act on the part of the parent; and, although as good, if fairly made, as if the consideration were valuable, yet what is there that a Court can treat as a consideration, which must be restored if a fraudulent appointment be set aside, or as incapable of restitution, and, therefore, support the appointment, so far as it is for the child's benefit? To say it is to be supported to that extent, would be to say that the child shall have the full benefit of the fraudulent agreement.

... Either, then, you must hold that a child giving a consideration for an appointment in its favor, is guilty of no fraud on the power, or you must wholly set aside the appointment procured by the fraud. Now, although the father, in proposing such a bargain, is much more to blame than the child in acceding to it, still it is impossible to say that an appointment, obtained by means of such an agreement, is fairly obtained. It is a fraud upon the other objects of the power, who might not, and in all probability would not, have been excluded but for this agreement. It is more particularly a fraud upon those who are entitled in default of appointment; for non constat that the father would have appointed at all, if the child had not agreed to the proposed terms."

The distinction taken by Sir W. Grant seems to be sound in principle; and appointments to children, in part fraudulent, have ever since, notwithstanding the dicta attributed to Lord Hardwicke, in *Lane v. Page*, Amb. 235, been set aside in toto. See *Farmer v. Martin*, 2 Sim. 502; *Arnold v. Hardwicke*, 7 Sim. 343; and see *Lee v. Fernie*, 1 Beav. 483.

Where, however, there is a sum of money to be appointed among children, although an appointment *to one child may be void on account of a [*315] corrupt agreement, an appointment to another child, although by a contemporaneous deed, if it can be severed from the previous appointment, so as not to form part of the same transaction, will be valid: *Rowley v. Rowley*, Kay, 242; and see *Harrison v. Randall*, 9 Hare, 397.

A fraudulent execution of a power will be set aside as against a purchaser for valuable consideration, with notice of the fraud: *Palmer v. Wheeler*, 2 Ball & B. 18: or even if he had not notice of the fraud, if he has not got the legal estate, for then there are only equities to deal with; and, as observed by Sir W. Grant, "The payment of a money consideration cannot make a stranger become the object of a power created in favor of children; he can only claim under a valid appointment executed in favor of some or one of the children:" *Daubeney v. Cockburn*, 1 Mer. 626, 638.

But a purchaser must, it seems, have actual notice of a fraud upon a power, in order to be affected by it; circumstances which may give rise to mere grounds of suspicion or probability of fraud are not sufficient. Thus, in *M^r Queen v. Farquhar*, 11 Ves. 467, where A. was tenant for life, remainder to his wife for life, with power to appoint to one or more of his children by her, A. entered into a contract with T. for the sale of the estate to him, and afterwards appointed (subject to the life-interest of himself and his wife) the fee simple of their estate to R., the eldest son, who had attained the age of twenty-one; and then A. and his wife and R. their son, conveyed the estate to T. in consideration of a sum of money, expressed to be paid to all of them. This appearing upon an abstract, an objection was taken to the title, that the appointment by A. in favor of his son R. appeared to have been made under a previous agreement between them; and that if A. derived any benefit from that agreement, which seemed probable, or even made any previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution of

the power. Lord Eldon, however, overruled the objection. "It does not appear," said his Lordship, "that the estate sold for less than its value—that the son got less than the value of his reversionary interest. But the estate becoming his absolutely by the appointment, he by an instrument, affected by nothing but the contents of it, as the owner of the reversion, accedes to the purchase, conveys with his father and mother in consideration of £8000, and the parties taking the conveyance pay the money to the father, the mother, and the son, to be dealt with according to their respective *interests; that is, according to their rights in the land: and, though the contract [*316] with T. was only to substitute money for the estate, there was nothing to show that the son was not to receive a due proportion of the money, when the contract was afterwards executed by the deed, in which he joins, and with his father and mother, receives all the money. Upon the question, therefore, whether those possibilities and probabilities are sufficiently evidenced by anything to show that this is not a good title, my opinion is, that it is a good title:" see also *Cockcroft v. Sutcliffe*, 2 Jur. N. S. 323.

Where there is an arrangement for settling the interests of *all* the branches of a family, children may contract *with each other* to give a parent, who had a power to distribute property among them, some advantage, which the parent, without their contract with each other, could not have. Thus, in *Davis v. Uphill*, 1 Swanst. 130, an estate being limited, under her marriage settlement, to A. *for life*, with remainder to her children by her deceased husband, in such manner as she should appoint, remainder, in default of appointment, to all the children as tenants in common; an agreement by the children, that on her joining in suffering a recovery, the first use to which the recovery should enure, should be to A. *for life*, *without impeachment of waste*, is it seems valid in equity: and the Court, therefore, refused to continue an injunction to restrain her from cutting timber. See also *Rhodes v. Cook*, 2 S. & S. 488.

But if any such transaction taken as a whole appears not to be a bona fide family arrangement, but that it has been entered into in fraud of the power, for the purpose of giving a benefit to a person who was by the donor excluded from being an appointee, or from deriving any advantage from the exercise of the power, it will be held wholly void: *Agassiz v. Squire*, 18 Beav. 431.

Where there is no fraud, equity will not advert to the circumstances of anger and resentment, under which it may be alleged that an appointment has been made. See *Vane v. Lord Dungannon*, 2 S. & L. 130, where Lord Redesdale said, he did not think it safe to advert to such objections, as there would be no end of them, if they were admitted as grounds for questioning appointments, since in almost all these cases, where there has been an inequality in the appointment, something of that kind has existed. See, also, *Supple v. Lowson*, Amb. 729.

If under a power of appointment and selection among children, an appointment be made upon a condition to be performed by the appointee, not authorized by the power, the appointment will be good, but the condition void: *Stroud v. Norman*, Kay, 313. *Re Lord Sondes' Will, 2 Sm. & [*317] Giff. 416; *Watt v. Creke*, 3 Jur. N. S. 56.

The principle laid down in *Aleyn v. Belchier*, viz., that a power must be executed *bona fide*, and for the end designed, is applicable also to another class of cases where parents, having power to raise portions for children, and even to fix the time when they are to be raised, will not be allowed by a court of equity, as personal representatives of a deceased child, to derive any advantage from an appointment made to the child during infancy, and while not in want of a portion, especially if the death of the child, at the time of the appointment, was expected. Thus in *Hinchinbroke v. Seymour*, 1 Bro. C. C. 394, a father, under a power, in a settlement to raise portions to be paid at *such time* as he should appoint, directed the trustees to raise £10,000 *immediately* for his daughter, then fourteen years of age, who soon afterwards died; he, as her administrator, filed a bill against the trustees to have the £10,000 raised for his own use, but Lord Thurlow dismissed the bill, observing, "The meaning of a charge for children is that it shall take place when it shall be wanted; it is contrary to the nature of such a charge to have it raised before that time. And although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes; but this is against the nature of the power.

So, also, where a fund was limited to a father for life, with remainder to his children, in such shares as he should appoint, and, in default of appointment, to the children equally, the father released the power as to a portion of the fund, so as to vest a share of it in himself, as executor of a deceased son, who, in default of appointment, took a vested interest; the Court refused to order the transfer of this share to the father: *Cunynghame v. Thurlow*, 1 Russ. & My. 436. "*The case of Lord Sandwich*," observes Lord Chancellor Sugden, "where a father, who had a power of appointment among his children, thinking one of them was in a consumption, appointed to that child, in order that he might take as the child's administrator, decides that if a father, having such a power, charges a portion for a child, not because the child wants it, but because it is sickly and likely to die, the Court has power to defeat it:" *Keily v. Keily*, 5 Ir. Eq. Rep. 442; 4 D. & W. 55; S. C., cited 11 Ves. 479. See, also, *Lord Pawlet's case*, 2 Vent. 366; *Edgeworth v. Edgeworth*, Beat. 328; *Gee v. Gurney*, 2 Coll. 486; *Wellesley v. Earl of Mornington*, 2 K. & J. 143.

[*318] An appointment however to an infant child before he wants it, will not be as invalid, merely because the appointor may, in the event of the child's death derive some benefit from it to the disappointment of those entitled in default of appointment: (*Butcher v. Jackson*, 14 Sim. 444; *Hamilton v. Kirwan*, 2 J. & L. 393; *Beere v. Hoffmister*, 23 Beav. 101;) a fortiori will the appointment be good if the parent himself can derive no benefit from it, although upon the death of the child the mother takes as their representative to the exclusion of the persons who would have been entitled in default of appointment. Thus in *Fearon v. Desbrisay*, (14 Beav. 641,) a father had a power of appointing a fund amongst his children, their shares to vest at such ages as he should appoint, and if he made no appointment, it was to vest in

them equally at twenty-one or marriage, and there was a gift over, if there should be no child entitled under the trusts or power: on the birth of a son, the father executed the power by giving the whole to such son, but afterwards upon an expected addition to his family, he being in a weak state of health, revoked the former appointment and executed the power in favor of *all* his children, *who should be living at his death*, equally. The father then died. It was held by Sir John Romilly, M. R., that the appointment was good as not being a fraud on the power, and that upon the death of one of the children the mother was entitled to her share as administratrix. "To say," observed his Honor, "that because the settlement specifies the manner in which the fund is to go if unappointed, the power must necessarily be partially cut down; so as to prevent the donee from disappointing those to whom the property is to go in default of appointment, does not appear to me a fair conclusion. . . . In the present case, it is manifest that the appointor could *gain no personal advantage for himself*, by the mode in which he has executed the power: for the persons in whose favor the appointment is to take effect could not be ascertained until his own death. All the cases therefore in which the donee obtained an advantage by the execution of the power may be excluded from my consideration. I cannot speculate on what other objects he might have had, if I find that he had the absolute power of appointment amongst his children, and that he exercised it in such a manner that he could not obtain any personal advantage from it."

If the consent of another person to the exercise of a power is requisite, and that consent is obtained by misrepresentation, the appointment will be set aside. Thus, in *Scroggs v. Scroggs*, Amb. Blunt's ed. 272, and App. 812, a case which falls entirely within the principle of *Aleyn v. Belchier*, a father was tenant for life, with *remainder to the use of such of his son and sons as he, with *the consent* of the trustees, or the survivor of them, [*319] should appoint, and, in default of appointment, to his first son in tail male. The father, by misrepresenting his eldest son to the surviving trustee as extravagant and undutiful, *prevailed upon him to consent* to an appointment to a younger son. Upon a bill being filed by the eldest son, it was proved that the son was dutiful and not extravagant, and that the father, from improper motives, had misrepresented him to the trustee. The appointment was set aside by Lord Hardwicke, who observed, that if the trustee and father had met fairly, and without imposition, and considered the family circumstances, and had executed the power for such reasons as biassed their judgment, the Court would not interfere; but that, upon the whole, he was of opinion that it was a power accompanied with a trust, and that it was executed by an imposition on the trustee, who was designed to be a check on the father.

There is another class of cases to be noticed, in which courts of equity have interposed, upon the same principle, but not with the same beneficial results as in *Aleyn v. Belchier*; viz. where a person having a power of appointing property amongst a class, although with full discretion as to the amount of their shares, has exercised it by appointing to one or more of the objects a merely nominal share; such an appointment, although valid at law, will, if

executed previous to the passing of 1 Will. 4, c. 46, be set aside as *illusory*, not being exercised bona fide for the end designed by the donor. To illustrate the doctrine of illusory appointments, suppose A. had a power to distribute £100,000 amongst a class in such shares and proportions as he should appoint, and he gave one of the class five shillings only, that would be at law a good execution of the power: *Morgan v. Surman*, 1 Taunt. 289. But such an appointment, or an appointment of ten guineas, or of any sum merely nominal, taking into consideration the amount to be distributed, and the number of persons amongst whom it is distributable, will, if executed previous to the passing of 1 Will. 4, c. 46, be held void in equity as illusory. It would, indeed, be perfectly competent to the donee of a power to make a very unequal distribution of the fund, provided that the inequality was not so great as to lay the appointment open to the objection of its being merely nominal and illusory, and, consequently, a fraud upon the donor of the power, who, it would be presumed, intended that each of the objects of the power should take a substantial share. Amongst the earlier cases on this subject, see [*320] *Gibson v. Kinven*, 1 Vern. 66; *Wall v. *Thurborne*, 1 Vern. 355, 414, and *Cragrave v. Perrost* there cited; *Astry v. Astry*, Prec. Ch. 256; *Maddison v. Andrew*, 1 Ves. 57; *Coleman v. Seymour*, 1 Ves. 211; *Vanderzee v. Aclom*, 4 Ves. 771; *Spencer v. Spencer*, 5 Ves. 362. The doctrine applies to appointments of real as well as of personal estate: *Pocklington v. Bayne*, 1 Bro. C. C. 450.

Much litigation arose in consequence of the great difficulty of deciding what was a substantial, and not merely an illusory share; and great dissatisfaction with the doctrine was expressed by the most eminent judges, who endeavored, in many cases, to narrow it. In *Wilson v. Piggott*, 2 Ves. jun. 351, where there was a sum of £4000 to be appointed amongst four persons, Lord Alvanley said, that an appointment of £250 to one of them would have been good. In *Kemp v. Kemp*, 5 Ves. 849, a person having a power of appointing nearly £1900 among three children, appointed £10 to one child, £50 to another, and the remainder to the third. Lord Alvanley, M. R., in his judgment, observed, "I should hardly have conceived that £50 could be considered a substantial part; but the sum of £10 to the daughter was evidently meant to be no gift, the mother merely supposing herself to be under the necessity of giving something to each. . . . I am bound to say the bequest of £10 was clearly meant as an illusion, and not as an execution; therefore the execution is void. It is vain now to lament, as I have in many other cases, that this Court did not follow the rule of law; but now this is so settled, that no judge will, and certainly I will not, presume to go against it. The Court must decide whether the share is substantial or not." In the celebrated case of *Butcher v. Butcher*, 9 Ves. 382, the objects of the power were nine in number, and the fund to be appointed amongst them about £17,000. To some of the objects of the power shares of £200 Three Per Cents. only were given. Sir W. Grant, M. R., held the appointment not to be illusory, but, like Lord Alvanley, strongly disapproved of this doctrine of equity. "To say," observed his Honor, "that under such a power an illusory share

must not be given, or that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share, and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given, to exclude the inference of the Court? What is the limit of the amount at which it ceases to be illusory, and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole, or of *the share, that would belong to each upon an equal division? In terms, the power, though limited as to objects, is discretionary as to shares. A court of law says, no object can be excluded, but there it stops; it does not attempt to correct any, the extremest, inequality in the distribution. . . . As no case has been found, in which a sum of this amount has been declared illusory, there is no ground upon which I think myself justified in determining that this is an invalid appointment." So in *Bax v. Whitbread*, 16 Ves. 15, where the fund to be appointed between two children, objects of the power, was 2500*l.* old South Sea Annuities, and 100*l.* stock was given to one child, and 2400*l.* to the other, Sir W. Grant, M. R., referring to his decision in *Butcher v. Butcher*, held that the appointment was not illusory. So, also, in *Mocatta v. Lousada*, 12 Ves. 123, the fund was 2500*l.*; the objects of the power were five in number; to some he gave only a share of 33*l.* 6*s.* 8*d.* Sir W. Grant, M. R., held the appointment not illusory. "I adhere," said his Honor, "to the rule I laid down in *Butcher v. Butcher*, that I will go as far as I am bound by an authority, but no farther. Show me a case in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held to be illusory, and I will, in the same case, make the same decision. But, where I am deprived of the guidance, or freed from the compulsion, of authority, I will not hold any appointment to be invalid upon that ground of objection. The case of *Kemp v. Kemp*, is not an authority for this case; for the discussion of that turned not upon the £50, but upon the £10. All that is decided in that case is, that the appointment of £10 was, under the circumstances, illusory, therefore, I must hold this appointment to be good, adhering to the rule I laid down in *Butcher v. Butcher*; for this sum of 33*l.* 6*s.* 8*d.* is not the same specific sum, or the same proportion of the share of each child, upon an equal division, that has been, in any former instance, held to be illusory." See, also, *Dyke v. Sylvester*, 12 Ves. 126, where his Honor adhered to the same rule.

Lord Eldon, however, although he affirmed the decision of the Master of the Rolls, in *Bax v. Whitbread* and *Butcher v. Butcher*, (see 16 Ves. 15, and 1 V. & B. 79,) disapproved of the rule there laid down by the Master of the Rolls. In the former of these cases his Lordship observes, "I should pause on giving judgment, if bound to decide upon those authorities with reference to the principle stated in these late cases, now before me, which, in effect (and it would be better to do it in words,) destroys all the authorities,

[*322] as no two cases will probably ever *be the same. The sum of £50 being given in one family, and by one will, it is difficult to imagine that the identity of the sum, or the proportion, can afford the ground of determination in another family and upon another will. The motives, also, must be furnished by the same circumstances, whether good conduct or misconduct; a provision by a parent or by a third person; circumstances, if the Court is at liberty to regard them, of utility; for instance, in the case of a power to appoint between two children, and the situation in life of one of them, the effect of the appointment may enable him to do more for the other, than if he had an equal share. If, therefore, it is established, that the Court has this authority to consider, whether the execution of such a trust, or power coupled with a trust, is reasonable, it seems to me better to deny the doctrine at once, than to lay down a rule that will destroy it in effect; looking only to sums and figures; excluding circumstances, unless in the same case; and considering in each case, merely, whether the motives and circumstances by which the judgment was so regulated, as among the different objects, were the same. . . . The result is, that from the time of Lord Nottingham the Court has taken upon itself the duty of exercising this discretion; and I should feel great embarrassment, if, on account of the difficulty and the apprehension of not well exercising it, I should step aside from the path of my predecessors, and be deterred from doing it as well as I can; confining myself to the inquiry, whether a case precisely the same had ever occurred; taking as my rule of acting, that circumstance, instead of the principle decided by former cases."

If a share not illusory comes to one of the objects in default of appointment, it will be considered as an appointment, and no question of illusion will arise: *Wilson v. Piggott*, 2 Ves. jun. 351; and it seems that, if, under a power to appoint amongst all the children, a part is well appointed to some, leaving a share not illusory, which is afterwards appointed, so as entirely to exclude one, the last appointment only will be void: *Wilson v. Piggott*, 2 Ves. jun. 355.

Formerly, an illusory appointment might be justified, and equity would not give relief against it when misbehaviour was shown in the child to whom such illusory share was given: *Maddison v. Andrew*, 1 Ves. 57; but this doctrine was overruled in *Kemp v. Kemp*, 5 Ves. 855, 1 V. & B. 97.

Where, however, gross inequality is accounted for by the situation of the children, and is humane and wise and discreet, the Court will not call it illusory; *Boyle v. The Bishop of Peterborough*, 1 Ves. jun. 310, per Lord Thurlow. Thus, an appointment of a very small share to a son, who is an uncertificated *bankrupt, would not be looked upon as illusory: *Bax v. Whitbread*, 16 Ves. 15. So, if a parent has made a provision for a child, an appointment of a very small share to that child would not be held illusory: *Bristowe v. Ward*, 2 Ves. jun. 336; *Smith v. Lord Camelford*, 2 Ves. jun. 698; *Long v. Long*, 5 Ves. 445; *Spencer v. Spencer*, 5 Ves. 367. The provision, it seems, must have been made by the donee of the power: *Mocatta v. Lousada*, 12 Ves. 123; though Lord Alvanley thought that the same result

would follow if the provision was made aliunde : *Vanderzee v. Aclom*, 4 Ves. 785 ; and see 16 Ves. 25 ; *Lysaght v. Royse*, 2 S. & L. 151, and 1 V. & B. 97. It is clear, however, that a provision moving from the donor of the power will not be sufficient. *Kemp v. Kemp*, 5 Ves. 861.

The interference of courts of equity, in cases of illusory appointments, was so unsatisfactory in its results, that the Legislature at length interfered, and by stat. 1 Will. 4, c. 46, passed June 16, 1830, it was enacted that no appointment, which from and after the passing of the Act should be made, in exercise of any power or authority to appoint any property, real or personal, amongst several objects, should be invalid, or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only should be thereby appointed to, or left unappointed to, devolve upon any one or more of the objects of such power ; but that every such appointment should be valid and effectual in equity, as well as at law, notwithstanding that any one or more of the objects should not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power ; provided that nothing in the Act contained should prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which should declare the amount of the share or shares from which no object of the power should be excluded ; and provided also, that nothing in the Act contained should be construed, deemed, or taken at law or in equity to give any other validity, force, or effect to any appointment than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to, devolve upon any object of such power.

Lord St. Leonards has observed, with reference to this Act, that, "where it is intended that a party shall have a power to divide a fund among several objects in *substantial* proportions, according to his discretion, but shall not be at liberty to give a merely nominal share to any, the smallest sum which the person creating the *power should wish each of the objects in any [*324] events to have, should be named, and it should be declared that the donee of the power shall not be at liberty to appoint a less sum to any of the objects." (1 Pow. 545.)

The statute as to illusory appointments (1 W. 4, c. 46,) does not make valid an appointment which previous to the Act would have been invalid, in consequence of the exclusion of certain objects of a power, not authorizing an exclusive appointment : *Minchin v. Minchin*, 3 Ir. Ch. Rep. 167.

"The general rule of law is, that the execution of a power must be according to the substantial intention and purpose of the party creating the power ; not restraining or lessening it by a narrow and rigid construction ; nor by a loose and extended interpretation, dispensing with the substance of what was meant to be performed. Powers are to be construed equitably

in a court of law as well as in a court of equity. And the general intention must be carried into effect, though it may defeat a particular intent." Per Thompson, C. J., in *Jackson v. Vee-der*, 11 Johnson, 169, 171. But where a power is discretionary, a court of law can grant no relief, and impose no penalty, in case of an unreasonable exercise of the discretion; the remedy is only in equity. In *Cloud v. Martin*, 1 Devereux & Battle's Law R. 397, a testator had directed that his grandson should be "raised and taken care of at the direction and care of his son, J. M.," and should be instructed in the English, Latin, and Greek languages; and he appointed J. M. one of his administrators. An action on behalf of the grandson was brought upon the administration bond, for failing to supply the grandson with funds for his support and education according to the will; but the Court held that the provision to be made for the grandson was entirely discretionary with J. M., and that his determination was binding at law. "Courts of equity," said Ruffin, C. J., "relieve against conditions, and prevent advantage being unconscientiously taken of their breach or non-performance; and also control the unreasonable exercise by one, of a power or discretion which may affect the interests of another person. The propriety of assuming to review and reverse the determination of one to whom a testator has given a discretion, absolute in terms, upon the ground that it was not a reasonable and just determination, though arrived at after fair inquiry, and full deliberation, has not escaped animadversion; since it makes the instrument read so as to confer on the Chancellor the discretion which

the maker of it declares he reposes exclusively in the individual selected by himself. But the jurisdiction is established; and upon the facts now appearing, relief would certainly be granted in equity, there being no cause whatever assigned for the neglect to provide for the testator's grandson; and such neglect or refusal without cause, is, by itself, unreasonable; and it does not appear that any fund was in fact provided. But a court of law is bound by the terms of the will; and the acts, right or wrong, of him to whom the testator gives the authority to decide, must stand as parts of the will. It is the testator's bounty, and must be taken subject to the restrictions by him imposed. If he puts it upon the will and judgment of another person, that will, however vicious, and that judgment, however erroneous and unreasonable, cannot be controverted at law. If the law itself confers an authority or discretion, it means a reasonable, and not an arbitrary one; and guards its faithful exercise, by giving damages for its malicious abuse; but a court and jury cannot limit a discretion, which parties for themselves declare shall be unlimited, or to which they have affixed no limit. Damages cannot be given for the neglect to exercise it, for there is no legal obligation to do so. Nor can its exercise upon mistaken, unreasonable or dishonest motives, be set at nought as not being, for those reasons, obligatory; because the motives do not impeach the legal power, but only affect the conscience of the party. The Court is unable to find a case of such jurisdiction at law, and knows of no principle on which to base it." And this controlling power in a court of equity was further recognized, in *Haynesworth v. Cox*,

Harper's Equity, 117, 119, where a testator gave to his niece four shares, "or in lieu thereof one thousand dollars, as his brother (the executor) might think best." It was decided by Dessausure, Ch., that the testator must be considered as meaning "best" for the legatee. "This reasonable construction," he added, "seems also to be in accordance with a rule of equity, which has long prevailed and is of considerable extent and application. It is, that where the power of electing is given to a trustee, as to the rights of a third person, the trustee is bound to exercise that power most beneficially for the *cestui que use*. Now an executor invested with such a power, is trustee for the legatee, and is bound to follow this rule of equity; and he shall not exercise it illusorily. This principle is illustrated by many decided cases which are familiar. See 5 Ves. 848; *Kemp v. Kemp*, 16 Ves. 15; *Bax v. Whitbread*, 11 Ves. 479; *M'Queen v. Farquhar*." [Hence, when a power to appoint among brothers and sisters and their children, in such proportions as the donee of the power should think fit, was exercised by appointing the whole to one, the appointment was held void and effect given to the purpose of the testator by a distribution among all; *Lippincott v. Ridgway*, 2 Stockton's Chancery, 164; and the same course would probably have been pursued had the appointment, although professedly to all, been so grossly unequal as to make in fact provision only for one; *Melvin v. Melvin*, 6 Maryland, 530.]

But the equitable jurisdiction to control the exercise of discretionary power of appointment among several persons, has been viewed with strong

disfavor, if not entirely condemned, in some of the courts of this country. In *Cowles et al. v. Brown et al.*, 4 Call, 477, where there was a power, after a life estate, to give among the nephews of the testator, "in such manner and proportion as he (the donee of the power) shall think proper," it was decided that a gift of unequal proportions was not objectionable: "It was left to him," said Lyons, J., "to make the appointments according to his own discretion; and then, what right has the court to control the execution? The latitude which has been sometimes taken by chancellors in England, has been reprobated, a different course is beginning to manifest itself there, 2 Fonb. Eq. 201; which meets my own approbation." A similar condemnation is passed upon this judicial authority in *Fronty v. Fronty*, 1 Bailey's Equity, 518, 529. "Powers may be general, or limited," says O'Neill, J., in delivering the opinion of the court in that case. "In the execution of a general power, there can be no rule but the discretion of the party to whom it is confided. In a limited one, the limitations contained in it constitute the rule by which it is to be executed. In the former, no court can undertake to control that, which the party creating the power intended to leave to the honesty, good faith, and discretion of the person to whom he confided it. In the latter, the courts do no more than execute the intention of the party by whom it is created, by declaring the execution of the power contrary to the limitations contained in it, void."

"The doctrine of illusory appointments, which, in England, has been carried to a most unwarrantable length,

and is reprobated by the wisest judges, is, nevertheless, predicated on the ground, that the power given has not been executed according to the intention of the testator. This, if it had been confined to plain and palpable violations of the intention, as indicated by the words of the power, could have produced no conflict between law and equity. But when it is attempted to

control a discretionary power of distribution among children, by saying that each must receive a substantial part, it is to substitute the discretion of the court for the discretion of the person to whom the power is confided. It is creating an equity against, and above the law, when it is our duty to follow, and obey the law; to declare it, not to make it."

FRAUDS ON MARITAL RIGHTS.

[*325] *COUNTESS OF STRATHMORE *v.* BOWES.

MARCH 2 AND 3, 1789.

REPORTED 1 VES. JUN., 22.¹

FRAUD ON MARITAL RIGHTS.]—*A woman, pending a treaty of marriage with A., settled all her property to her separate use, with his approbation; a few days after, B., by stratagem, induced her to marry him, the day after she first thought of it: B. had no notice of the settlement. The settlement was established, and a deed of revocation obtained by duress set aside.*

The burthens, to which a husband is liable are a consideration for his marital rights, upon which, therefore, fraud may be committed.

Conveyance by a woman under any circumstances, and even the moment before marriage, is good, prima facie; is bad only if fraudulent, as where it is made pending the treaty, without notice to the intended husband.

LADY STRATHMORE being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey, conveyed all her real, and assigned all her personal estate, to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of Grey.

A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement.

There were two bills; an original bill by Lady Strathmore, to set aside a deed revoking the settlement, as having been obtained by duress; and a cross

¹ S. C., on the first hearing, 2 Bro. C. C. 345; 2 Cox, 28, affirmed on appeal, 6 Bro. P. C. 427, Toml. ed.

bill by Mr. *Bowes, to set aside the settlement, as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation. [*326]

An issue was directed, to try whether the deed of revocation had been obtained by duress; and the verdict in the Common Pleas was against the deed. The cause coming on upon the equity reserved, Mr. Justice Buller, sitting for the Lord Chancellor, decreed in favor of Lady Strathmore, and dismissed the cross bill with costs.

It came on again, upon the petition of Mr. Bowes, for a rehearing, and reversal of that decree so far as it dismissed the cross bill.

Mr. *Richards*, for Mr. Bowes.—The question is, whether this settlement, made before marriage, is valid or not, as being in derogation of the common rights of marriage. A wife, by the marriage contract, becomes extinct, from the nature of it, for several civil purposes with regard to which she merges in the husband. He becomes liable to all her debts, and answerable for all her acts that do not amount to felony; and even for that, if committed in his presence; because her mind is supposed to be under his coercion. In order to enable him to answer this, he has by the law all her property. It is absurd to say, the wife shall by her own act deprive the husband of what the law has given him. It was not decided till lately, that a legacy to a wife for her sole and separate use would have been good without the interposition of trustees; and this case is much stronger, because to be construed more strictly than a devise; nor can the interposition of trustees make any difference, because it cannot alter the nature of the thing. As to his not having made any settlement on her, many marriages are made without any; and in this case it could not be necessary; for she had £10,000 or £12,000 a year, a great estate for life, and much personal property. There is another principle very material: marriage, by the law of England, gives the husband the whole dominion over the property, and also over the person of his wife, except as *to murder; for, by the old law, he could not be punished for cruelty towards her. The civil existence of the wife merged in that of the husband: he is the head of the family; to make another, would be against the policy of the law. If the wife can by her own act, against the consent of the husband, make herself independent of him, it will destroy that subordination so necessary in families, which is analogous to that in the state, and tends to support it; for if Lady Strathmore is right in this, the husband is become a cipher in his own house; for he cannot educate his children, or do any other act, which by law he has a right to do. The deed was executed on the 10th or 11th of January, and the marriage took place upon the 17th. If the deed had been meant fairly in contemplation of marriage, the husband would have been a party to it: there is no instance to the contrary; and it is necessary, in order to testify the consent of the husband. In *Howard v. Hooker*, 2 Ch. Rep. 81, a settlement by the wife, before marriage, without notice to the husband, was set aside. In *Lance v. Norman*, 2 Ch. Rep. 79, a bargain entered into by the wife, before marriage, was set aside, because the [*327]

husband was not a party; and this case is stronger: because there, the wife was only made poorer; but here she is made quite independent of the husband. In *Carleton v. Dorset*, 2 Vern. 17, the estate was made over, before marriage, to trustees without privity of the husband; a conveyance was decreed to the six-clerk, and the personal property to be paid into Court for the husband, because in derogation of the rights of marriage; and in *Edmonds v. Dennington*, cited in the foregoing case, a deed of settlement made before marriage, without notice to the husband, was set aside. In *Poulson v. Wellington*, 2 P. Wms. 535, Lord King said, that if a woman before marriage settled her property, without giving notice to the intended husband, it would, as to him, be fraudulent and void. In *Cotton v. King*, 2 P. Wms. 358, 674, Lady Cotton, widow, had ten children by her first husband, and before the second marriage, by indenture settled part of her fortune in their favor [*328] *(reserving, however, a considerable portion,) without notice to the husband. King filed a bill to have this deed delivered up to him: but as the transaction of making the deed had been public; as she had so many children by her first husband, for whom it was reasonable to provide before she entered into a second marriage; and as the second husband was a person in mean circumstances, and had received a good fortune with her; and as she had reserved something to herself, King's bill was, for these reasons, dismissed. This decision shows, that if it had not been for the benefit of the children of the first marriage, and on account of these several circumstances, it would not have been good. Upon these cases, and the principle of the thing, this settlement is void, as being in derogation of common right. It is to be observed, that in all these cases something was reserved; here there is nothing; for Lady Strathmore has conveyed all her real, and assigned all her personal, property to trustees, for her own use; and the circumstance of appointing trustees will not alter the nature of the thing, though it drives us into a court of equity.

Mr. *Mansfield*, Mr. *Hardinge*, Mr. *Law*, and Mr. *King*, for Lady Strathmore.—Lady Strathmore is in possession by a deed to trustees, giving her own property to her use. It was done in contemplation of marriage with another person; therefore not fraudulent as to Mr. Bowes, unless any deed by a feme sole, by which she disposes of her property, shall be construed to be fraudulent, if not communicated to any future husband. Want of communication is the only circumstance that can be alleged; but that is very different from concealment, for which there can be no pretence here. It is true, a man by marrying a woman gains a dominion over her property, and in a great degree over her person, though perhaps not in the extent contended; but he had nothing to do with this property, for it was not in her at the time of the marriage, having been previously vested in trustees: and as every man knows that a woman may settle her property so that a future husband shall not be able to [*329] *touch it, Mr. Bowes ought to have inquired about it beforehand. There is no pretence of actual imposition upon him, or even upon Grey. The deed was prepared by a gentleman of the first credit; she had several children by Lord Strathmore; she was going to marry Mr. Grey, and

made this previous settlement for her children ; and she acted meritoriously and honorably in so doing. The deed was with Grey's knowledge and under his direction ; his approbation of it appeared by his having called to know when it would be ready, and to hasten it ; and it was prepared, though not executed, a month before the time of the marriage, therefore not fraudulent as to Mr. Grey ; and there is no authority for vacating a settlement made by a woman for the protection of her children, without fraud. Mr. Bowes made no settlement on Lady Strathmore ; neither did King upon Lady Cotton, in the case cited (which was one of the grounds of the decision in that case,) though Bowes had some fortune by a former wife. He took Lady Strathmore as she then was, with what she then had ; therefore there is nothing fraudulent, or that can entitle him to relief in this court. Knowing that she was a woman subject to sudden and violent impulses of generosity, he made use of a vile artifice to obtain her by means of a sham duel (for it is in every stage of the cause admitted to have been so) with the proprietor of a newspaper, who had traduced her ; and the emotion and precipitation which he caused by this artifice, was the cause which prevented the communication of the actual situation of her fortune. After this, Mr. Bowes made use of the most reproachful means to set aside this deed ; and the verdict was, that the revocation was obtained by violence. He would not have done this, had he not thought the deed a good one. The reason of the case is (nor is there a dictum to the contrary,) that where a woman about to marry, represents herself as possessed of a fortune which she had previously disposed of, this Court will not permit the husband to be cheated. *Howard v. Hooker*, to which all the cases refer, was of that kind, being a specific fraud *upon the husband. The marriage had been broken off, and was brought on again [*330] by the interposition of friends, upon the idea of the husband that he was to enjoy the wife's fortune, in consideration of which he made a settlement on her of £500 a year. In *Lance v. Norman*, the wife before marriage entered into a recognizance, concealed from the intended husband, and the object of it was to enable the creditor, who was her own brother, to distress the husband ; and they had made an attempt to defraud him before, by getting him to sign a deed which was in Latin, that he might not understand it, telling him it was only a memorandum. In *Carleton v. Dorset*, the wife conveyed all her fortune to trustees for her own use, with permission to herself to appoint, and in default of appointment, to her own right heirs, and afterwards married : here the case was, that the husband had assurance that he was to enjoy the estate of his wife ; and the decree was upon the ground that it was a trust for her, with power to appoint ; and as she made no appointment, it was resolved to be a trust for her husband. Besides, in that case, the fortune was paid into court, and a reasonable allowance was to be made to her. It has been remarked, that the foundation of the decree in *King v. Cotton* was, that it was to provide for children, which has been said to be the only case in which this can be good : but the settlement on children, or on any one else, will not make any difference ; the question is, what right the husband has ; if he has any right, notwithstanding any voluntary disposition without notice

to him, because he was deceived, the manner in which that deceit was practised will make no difference with respect to him; for the ground for relief must be, that he was cheated, because the settlement was not communicated to him. *King v. Cotton* is for Lady Strathmore; for Lady Cotton had disposed of her fortune so as to put it quite out of the power of her husband; and yet the settlement was established. As to *Edmonds v. Dennington*,¹ Mr. Justice Buller suspected that it was misreported in Vernon, where it is only a loose note cited at the bar; and, on inspecting the *register, the decree turns out to be quite different from that report; for the deed was established upon the ground of distinct notice to the husband; and, in that case, as in this, the settlement was of all her property. These cases, therefore, only go on the ground of fraud of the husband, of which there is no suggestion here. But this is not a question upon a deed executed by a future wife pending a treaty of marriage with a future husband; nor upon a deed made in prejudice generally of marital rights; nor of a settlement by a husband, by which he pays for his future power over the fortune of his wife. Suppose a husband to say he is indifferent as to the fortune of his wife, in order to appear disinterested; suppose, having a fortune, he makes no settlement; and suppose the marriage instantaneous, no time being given for communication or concealment; is it enough for the husband to say, his secret hope was disappointed? The only pretence here is, that he expected her fortune would have been greater than it proved, which expectation he did not disclose. To make this deed valid, is only to put a safeguard in her hands against the consequences of an improvident marriage; and she had a right, while sui juris, to baffle, for so much, what would otherwise have been the marital power of her husband. It is enough for us to say, Mr. Bowes was not cheated.

LORD CHANCELLOR THURLOW.—The mere question seems to be, what is the true foundation for setting aside an instrument prima facie good? Can less be imputed to it than fraud? Or can it be void upon the notion of general policy, as has been urged for Mr. Bowes? If not, must not fraud be imputed? and, if so, will the circumstances of its being made in contemplation of marriage affect it with fraud? Suppose a relation had given £10,000 for her sole and separate use; if she had represented it as her own absolutely, so that, upon a marriage, it would have gone to her husband, this Court would have compelled the trustees to give it to the husband, but not otherwise;² nor [*332] is there any difference between a *fortune so circumstanced by an act of her own, or of the donor. Consider what will be the effect of this void deed of revocation. If he had joined with her to revoke that settlement and appoint new uses, he could not have rescinded that afterwards; because he had affirmed the deed by acting upon it. If he had acted honestly upon it, as in the case I have put, he could not have set that aside; his counsel are to show that he may, because he has acted dishonestly upon it, which at present I think rather a vain attempt.

¹ And see 1 My. & K. 621.

² See *Ashton v. M'Dougall*, 5 Beav. 66.

¹Mr. Partridge was to have argued for Mr. Bowes, by way of reply, at his own request, but could not attend.

LORD CHANCELLOR THURLOW.—I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. Bowes would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burthens, which are the consideration he pays for them; therefore, it is a right upon which fraud may be committed. Out of this right arises a rule of law that the husband shall not be cheated on account of his consideration.

A case of this kind came before me a few days ago.² A woman adult, about to marry an infant, made a settlement, in contemplation of that marriage, in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought the circumstance of its being fair would bind him, though as an infant, not capable of consenting; according to which I held the settlement good, as she was capable of conveying; and as it was a public and open transaction, with the consent of the family, and consequently no fraud, though his being privy to it would not have concluded him from any rights as being an infant.

A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is prima facie good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good prima facie, because affected with that fraud. [*333]

As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object; she was disposed to marry anybody, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and, if there can be reason in madness, by doing this she discovered a spark of understanding.

The question which arises upon all the cases is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Grey, for it was with his consent; and so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey, she made this settlement with his knowledge; and the imputation of fraud is, that having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circumstances. It is impossible for a man marrying in the manner Bowes did, to come into equity and talk of fraud. Therefore, the decree must be affirmed, with costs; but let him have all just allowances as to what he paid

¹ March 3.

² Slocombe v. Glubb, 2 Bro. C. C. 545.

when in receipt of the profits, and as to the annuities, which are declared not to be disturbed by the decree.

In the well-known case of *Strathmore v. Bowes*, the rule upon which courts of equity act in setting aside a settlement made by a woman of her own property, previous to marriage, in violation or fraud of the marital rights of her [*334] intended husband, is well laid *down by Lord Thurlow. "A conveyance by a wife," observes his Lordship, "whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the *imputation of fraud*. If a woman, *during the course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud."

The case, however, of *Strathmore v. Bowes*, does not come within the principle of those cases in which, according to the rule as laid down by Lord Thurlow, a court of equity will set aside a settlement of a woman's property, made by her previous to marriage; for it will be observed, that the settlement was made by Lady Strathmore with the consent of Grey, her then intended husband, and not during the course of a treaty of marriage with Bowes, whom she afterwards married, and it was, therefore, not a fraud upon him. The settlement, to use Lord Thurlow's words, was *prima facie* good, and there was no imputation of fraud to render it bad. "*Strathmore v. Bowes*," observes Lord Loughborough, "went upon this, that the deed was honest and proper, being made in contemplation of a marriage with another person, and with the consent of that person:" *Ball v. Montgomery*, 2 Ves. jun. 194; see, also, *M'Donnell v. Hesilridge*, 16 Beav. 346. It is necessary, therefore, for a person impeaching a settlement, to prove that, at the time of its execution, he was *the then intended husband*, otherwise it will not be set aside: *England v. Downs*, 2 Beav. 522; *Cheshire v. Payne*, 16 B. Monroe, 618.

It is clearly settled, that if a woman, during a treaty for marriage, holds herself out to her intended husband as entitled to property, which will become his upon the marriage, and then makes a settlement of it without his knowledge or concurrence, actual fraud will be imputed to her, and the settlement will be set aside in a court of equity. "If," observes Lord Langdale, M. R., "a woman entitled to property enters into a treaty for marriage, and, during the treaty, represents to her intended husband that she is so entitled, that, upon the marriage, he will become entitled *jure mariti*; and if, during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved [*335] do or do not amount to sufficient evidence of fraud practised *on the husband. It is not doubted that proof of direct misrepresentations,

or of wilful concealment, with intent to deceive the husband, would entitle him to relief." *England v. Downs*, 2 Beav. 528; see also *Howard v. Hooker*, 2 Ch. Rep. 81; *Carleton v. The Earl of Dorset*, 2 Vern. 17; S. C., 2 Cox, 33.

It was observed by Mr. Justice Buller, when *Strathmore v. Bowes* was before him, that "Fraud consists in falsely holding out that a woman has an estate unfettered, and that the husband will be of course entitled to it. No case has yet established, that all conveyances by a wife before marriage are void, merely because not communicated to the husband:" 2 Bro. C. C. 350; 2 Cox, 29. And again, he says, "It is necessary to show other facts, and that the husband is actually deceived and misled; and that the bare concealment is not sufficient:" 2 Cox, 30. These dicta, however, of Mr. Justice Buller can scarcely be supported, although there have been some cases in which, under peculiar circumstances, it has been held that a bare concealment by a woman from her intended husband, of a gift or a settlement of part of her property made during the treaty for a marriage, was not sufficient evidence of fraud, so as to render the settlement void as against the husband. Thus, in *Thomas v. Williams*, Mos. 177, a woman, during a treaty of marriage, released a legacy to which she was entitled, without the knowledge of her husband. Lord King, however, refused to set aside the release, because it did not appear that he ever inquired after the legacy. So also in *De Manneville v. Crompton*, 1 V. & B. 354, a daughter, after instructions were given for her marriage settlement, by which she assigned all moneys, debts, bills, bonds, notes, and other securities for money, and chattels real, and other chattels, and personal estate, to trustees, upon trusts under which her intended husband took only a partial and contingent interest, without his knowledge cancelled a promissory note for 2000*l.*, which had been given to her, without consideration, about seventeen years before, by her mother, then a widow, as a provision in case she should marry again; Lord Eldon held, that the husband was entitled to no relief with regard to the note. "My opinion," observed his Lordship, "is that the marriage was not upon any representation as to the amount of the property, that it should be *in no way diminished*, or that this note should make part of the settlement; and I should go beyond any precedent by holding that here was a misrepresentation leading to marriage, which was either fraudulently or substantially defeated by what took place afterwards with reference to this note."

However, in *Goddard v. Snow*, *1 Russ. 485, a woman, ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years afterwards she died, and after her death the husband filed a bill to have the money paid to him. It was argued, on behalf of the defendants, that, as the husband did not know of the existence of the sum of money, and was, therefore, not induced to contract the marriage on the notion that it would be subject to his marital rights, no fraud, such as the authorities held to be necessary, had been committed; that there

was, at the utmost, only concealment, and that concealment alone was not sufficient to avoid a settlement confessedly valid at law. Lord Gifford, M. R., however, held that the settlement was void against the husband, as a fraud upon his marital rights; and his Lordship said, that the opinion of Lord Thurlow, in *Strathmore v. Bowes*, was, that if a woman, contemplating marriage with an individual, made a settlement of her property on herself, reserving to herself the dominion over it, and *concealed* that settlement from her husband, the settlement was a fraud on his marital rights, which he was entitled to avoid. See *St. George v. Wake*, 1 My. & K. 622, where Lord Brougham says, that the principle was carried further in *Goddard v. Snow* than in any other case.

It has been supposed that a settlement by a widow upon her children by a former marriage, even if made during the treaty for a second marriage, without the knowledge of her intended husband, is valid, because the object of the settlement, it has been said, is meritorious. *Hunt v. Matthews*, 1 Vern. 408, and *King v. Cotton*, 2 P. Wms. 674, Mos. 259; have been cited as supporting this proposition; it appears, however, by an extract from the decree in Mr. Raithby's edition of Vernon, that the husband, in *Hunt v. Matthews*, *consented* to the settlement being made by his intended wife upon her children by a former marriage; and in *King v. Cotton*, the settlement was made by Lady Cotton upon the children of a former marriage, *previous to her entering upon a treaty for a second marriage*.

These cases, therefore, only decide that a settlement is valid if made by a woman upon her children by a former marriage, either with the consent of the intended husband, or without his consent or knowledge, if made *previous to the treaty for marriage*; but it is conceived that a provision for children would not render a settlement valid which without it would be fraudulent; [*337] *for, although in the execution of a settlement, so far as it makes provision for her children, a woman may perform a moral duty towards her children, she has no right to act fraudulently towards her husband; and she can, in such circumstances, only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband; see *England v. Downs*, 2 Beav. 528, 529; in which case, however, the settlement made by a widow upon herself and the children of a former marriage was held not to be fraudulent, because it was not proved that the person she afterwards married was, at the time of the execution of the settlement, "*her then intended husband*."

In *Taylor v. Pugh*, 1 Hare, 608, where a husband filed a bill to set aside a settlement made, as he alleged, in fraud of his marital rights, it was argued, that, as he was ignorant that his wife had any property, and as she had practised no actual deception upon him, a court of equity ought not to interfere; but Sir James Wigram, V. C., although he decided against the husband upon other grounds, clearly intimated his opinion that those arguments were unsound. "It was argued," observed his Honor, "for the defendants, who resist this claim, that the plaintiff was ignorant, until after the marriage, that the wife was possessed of the property in question; and I was referred to

cases, in which the Court had apparently laid some stress on that circumstance, as a ground for refusing relief to the husband."

"In *De Mandeville v. Crompton*, Lord Eldon made the important observation, that, in the absence of any representation having been made as to specific property, no implied contract is raised on the part of the lady, during the treaty of marriage, that her property, as it existed at the time of the commencement of the treaty, shall be *in no way diminished*. This undoubtedly shows Lord Eldon's opinion to be, that it is not every alienation of the wife's property, during the treaty, which can be regarded as fraudulent, only because the husband was not a party to it. But I should certainly have great difficulty in applying the proposition so laid down by Lord Eldon to a case in which every farthing of the wife's property was, without the knowledge of the husband, wholly withdrawn from his control and settled on herself, her children, or her appointees, to the total exclusion of the husband. A very special case must be made out before the Court would carry the proposition so far. I think Lord Eldon meant only to decide, that, there being no implied contract on the part of the lady, that her property should not be in any way diminished, it is for the Court to determine, whether, having regard to the condition in life of the parties, *and the other circumstances of the case, a transaction complained of by the husband should be treated as fraudulent or not." [*338]

"I think another argument on behalf of the defendants was also carried beyond its just limits, in contending that actual fraud or deception on the husband must be proved. Notwithstanding there are some dicta which may at first be considered as implying the contrary, (but which may, I think, be explained,) I take the rule of the Court to be correctly stated in Mr. Roper's Treatise, vol. 2, p. 162: 'Deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence.' This way of stating the law does not exclude inquiry into the circumstances by which the apparent deception may be explained; nor does it conflict with the modern cases to which I was referred. I shall, as I understand those cases, content myself with referring to the valuable note of the learned editor (Rop. Hus. & Wife, vol. 2. p. 166, n.,) in support of the general proposition I have cited.

"Several circumstances would certainly appear to have been sometimes thought material as negating the imputed fraud; such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement, as in the case of a settlement upon the children of a former marriage—and the ignorance of the husband that his wife possessed the property. . . . I could not give my individual assent to the sufficiency of any of the reasons I have mentioned. The poverty of the husband—the absence of any settlement upon the wife—the reasonable manner in which she desires to deal with her property, may be very material considerations for the guidance of the parties in determining in what manner the wife's fortune should be settled; but why they should constitute a reason for

concealing the arrangement from the husband, I cannot comprehend. It might be very proper to bring these considerations to the attention of the intended husband. He might be told that the lady has a certain fortune, but regard being had to the claims upon her, and to his circumstances, the settlement ought to be made in a particular way; but I cannot comprehend the reasoning, which says, that any one of the reasons suggested is a sufficient ground for practising concealment upon the husband, or treats such concealment as immaterial. So, also, with respect to ignorance of the husband of the property of the wife—that, no doubt, materially lessens his disappointment at finding the wife's fortune has been withdrawn from his control; but [*339] the equity is not founded upon his *disappointment; for, if that were so, it would follow that his ignorance of the existence of the property would always be an answer, however that ignorance was produced; the equity would never arise where the wife had contrived to conceal her property from the husband; but this is not so, for the cases clearly show that practised concealment by the wife will be treated as a fraud on the husband."

But a gift or settlement, by a woman, of her property, during the treaty for marriage, will not be set aside, if the husband knew of the gift or settlement before the marriage. Thus, in *St. George v. Wake*, 1 My. & K. 610, where a lady, during a treaty for a marriage which afterwards took effect, made a voluntary assignment of part of her property to her sister, her husband filed a bill to set it aside; but he did not allege that the transaction was concealed from him, or that he was ignorant of the assignment having been made, at the time of the marriage. Sir J. Leach, M. R., held, that the husband, who was, under the circumstances, presumed to have had notice of the assignment before his marriage, was not entitled to set it aside on the ground of fraud. And his Honor stated, that he had looked into the authorities, and had not found any case which went the length of establishing the proposition, that if a person who had entered into a treaty of marriage with a lady, knew of a gift made by the lady pending such treaty, and nevertheless thought fit to marry her, the gifts could be considered as void in this Court. At law, if a lady secretly disposed of a part of her property, after the contract of marriage, the contract was thereby avoided; and proof of this secret disposition was a valid defence, if an action were brought against the intended husband for breach of the promise of marriage. This decision, on appeal, was affirmed by Lord Brougham. See also *Ashton v. McDougall*, 5 Beav. 56; *Griggs v. Staplee*, 2 De G. & Sm. 572; *Wrigley v. Swainson*, 3 De G. & Sm. 458. See 1 My. & K. 619.

In *Taylor v. Pugh*, 1 Hare, 608, where a man had induced his intended wife to cohabit with him previous to marriage, Sir J. Wigram, V. C., refused to set aside a settlement of her property, although executed without his knowledge, during the treaty for the marriage, because the husband, before the marriage, had put it out of the power of the wife effectually to make any stipulation for the settlement of her property, by his conduct towards her. "Retirement," said his Honor, "from the marriage on her part was impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the whole of her fortune."

The concurrence or acquiescence of the husband in the settlement, even though he be a minor, will preclude him from taking any *objections [*340] to it: *Slocombe v. Glubb*, 2 Bro. C. C. 545. And if a husband acquiesces in, or confirms, a settlement, he will not afterwards be allowed to dispute it: *Maber v. Hobbs*, 2 Y. & C., Exch. Ca. 317; *England v. Downs*, 2 Beav. 535; *Ashton v. McDougall*, 5 Beav. 56; *Grazebrook v. Percival*, 14 Jur. 1103; *Loader v. Clarke*, 2 Mac. & G. 382.

If a woman gives a security to a *volunteer*, prior to marriage, without the consent of the intended husband, it may be set aside by him. Thus in *Lance v. Norman*, 2 Ch. Rep. 79, the wife of Lance the plaintiff, the day before her marriage, was persuaded to enter into a recognizance of £2000 without defeazance, to her brother, the defendant, without the privity or consent of the plaintiff. The Court, being assisted by the judges, held, that the recognizance was entered into whereby to defraud the plaintiff; and decreed it to be set aside and vacated on the record thereof, and granted a perpetual injunction against it.

But where a woman, about to marry, gave a bond for *valuable consideration*, although without her intended husband's knowledge, it was held by Lord Hardwicke, that the husband could not be relieved against it. "If," observed his Lordship, a woman about to marry parts with part of her property, or gives a security or assignment, they are relievable against in this Court; but where a debt is contracted for *valuable consideration*, though concealed from the husband, it is no fraud on the marriage. But concealment of such securities or debts is not to be encouraged:" *Blanchet v. Foster*, 2 Ves. 264; see also *Llewellyn v. Cobbold*, 1 Sm. & Giff. 376.

It has been frequently decided in this country, that a secret voluntary settlement or conveyance of her property by a woman, pending a treaty of marriage, and in contemplation of marriage, without the knowledge of her intended husband, is fraudulent and void against her husband, as being in derogation of his marital rights and just expectations; *Tucker v. Andrews*, 13 Maine, 124, 128; *Walker v. Armistead's Adm'rs*, 2 Leigh, 11, 14; *Linker v. Smith*, 4 Washington, 224, 225; *Manes v. Durant*, 2 Richardson's Equity, 404, 406; *Ramsay v. Joyce*, 1 M'Mullen's Equity, 237, 249; *Logan v. Simmons*, 3

Iredell's Equity, 487, 494; *M'Affee v. Ferguson, &c.*, 9 B. Monroe, 475, 477, 478; *Williams v. Carle*, 2 Stockton's Chancery, 543. "The fortune of the intended wife," said Johnson, J., in *Terry, Adm'r, v. Hopkins and others*, 1 Hill's Chancery, 1, 4, "is most frequently a weighty consideration and a strong inducement to the marriage contract, and the happiness of both the parties may, in a great degree, depend on the observance of good faith, with respect to it; and the general rule, very clearly, is, that if pending a treaty of marriage, the intended wife makes a secret voluntary disposition of her property, and

the marriage is had, it is a fraud upon the marital rights of the husband, and is void."

It is universally agreed, that the ground of the invalidity of such transactions as against the husband is fraud. There is no doubt, of course, that if the husband has been actually and intentionally deceived and misled by the conduct of the wife, the transaction is void; *Logan v. Simmons*, 3 Iredell's Equity, 487, 497; and the sounder view, and the one prevailing generally in the courts of this country, is, that mere concealment,—*suppressio veri*,—the suppression of truth which the party was bound to disclose," constitutes, or evinces, fraud upon the rights of the husband, who is a purchaser in law of all the property of the wife. "If one should sell to another," said Harper, Ch., in *Manes v. Durant*, 2 Richardson's Equity, 404, 406, "for a valuable money consideration, property, of part of which he had a few days before made a voluntary conveyance to a third person, it could hardly be doubted that this amounted to actual fraud." The subject was discussed at some length, in *Logan v. Simmons*, 3 Iredell's Equity, 487, 494, and while it was admitted, "that it is a point yet open, and on which respectable opinions are much divided, whether concealment by the wife, merely, where there is no active expedient adopted to keep the husband in ignorance, and he makes no inquiry, is, *per se*, a fraud," yet a strong view in favor of that principle was presented in the opinion of the court, delivered by Ruffin, C. J. "A husband," he remarks, "being bound to pay his wife's debts and to maintain her during coverture, and being chargeable by the

law with the support of the issue of the marriage, and bound by the ties of natural affection also to make provision for the issue, it is in the nature of things, as a matter of common discretion, that a woman's apparent property should enter materially, if not essentially, into his inducements for contracting the marriage, and incurring those onerous obligations. 'It is also to be assumed by a man proposing this relation to a woman, that she too has a view to their means of livelihood after marriage, and feels an interest in the provision that, between their joint stocks, can be made for a family. Every woman, therefore, must suppose, that the man, who is about to marry her, expects that she will not put away her fortune, at least the visible part of it, and thereby diminish his ability to discharge his duties and legal obligations to herself, her creditors, and her future family. And if she, after allowing him to form such expectations, deliberately defeats them by a conveyance of her property, and draws him into a marriage by a deception on that point, it would seem, that it could be nothing less than a fraud on the husband. He is disappointed of what the law promised him, and of what she had held out to him he would get. In such a case, it may be well argued, that a concealment of the conveyance would amount to a fraud, upon the principle of *suppressio veri* being in bad faith, when a person, towards whom it is practised, has an interest in knowing the truth, and has no ground to suspect anything that has not been avowed." And this, it is added, should be particularly the case in this country, where settlements are rare, and where the husband expects to get

all that the wife has—that is, expects that she will allow him to receive by the marriage, all that she would keep for herself and within her own power, if she had not contracted the marriage. “It is certain,” said Johnston, Ch., in *Ramsay v. Joyce*, 1 M’Mullan’s Equity, 237, 242, “that all the cases rank the husband as a purchaser of the property, held by the wife, during the treaty of marriage. I do not suppose that he has ever been regarded as a mere vendee, so as to be entitled to unravel trifling alterations in the wife’s property, if made without his concurrence. But any material alteration, if voluntary, would, without explanatory circumstances, be regarded as evidence of fraudulent intention, and be liable to just exception on his part.”

The fraud, however, is of a nature to be relieved against only in a court of equity; the conveyance or settlement cannot be treated as void at law; *Logan v. Simmons*, 1 Devereux and Battle’s Law R. 13, 16.

It is agreed, that if the husband has notice or knowledge of the settlement, before the marriage, the transaction cannot be impeached; *Terry, Adm’r, v. Hopkins and others*, 1 Hill’s Chancery, 1, 5; *M’Clure v. Miller*, 1 Bailey’s Equity, 108, 109; *Cheshire v. Payne*, 16 B. Monroe, 618. See *Fletcher and Wife v. Ashley et als.*, 6 Grattan, 332, 339; and if the husband is a party to the settlement, though a minor, it will be valid, for it is evidence of his privity and consent, to repel the presumption of fraud, though he may be incompetent to convey any right or interest; *Kottman et ux. v. Peyton et al.*, 1 Spears’ Eq. 46. “The only circumstances relied upon in this case,” said Simpson, J.,

in *Cheshire v. Payne*, “to render the deed fraudulent against the husband, are its execution after the marriage contract was entered into, and his ignorance that it had been executed until a few moments before he was married. To render a disposition made by the wife of her property before marriage, fraudulent against her husband, as being in derogation of his marital rights and just expectations, it must be made pending a treaty, and in contemplation of marriage, and without the knowledge of her intended husband. Both of these elements must enter into the transaction, to constitute it a fraud against the rights of the husband.”

“If the husband be apprized before his marriage of the disposition which his intended wife has made of the property, he cannot, in any just sense of the term, be said to be deceived by it. If, notwithstanding such knowledge, he deems it proper to consummate the marriage contract, the act is voluntary on his part, and he cannot afterwards complain that the disposition which his wife made of her property, is a fraud upon his marital rights. If the intended wife should secretly and without the consent of the man she had contracted to marry, dispose of a part of her property, the marriage contract would be thereby avoided; and proof of such a secret disposition of her property would be a valid defence, if an action were brought against the intended husband for breach of the promise of marriage; (*Ashton v. M’Dougal*, 5 Beav. 56; *Griggs v. Staplee*, 13 Jur. 32; see also *My. & K.* 619, referred to 1st vol. White’s Leading Cases in Equity, Hare & Wallace’s Notes, p. 448.)”

“It is true that it was held by this

court, in the case of (*Hobbs v. Blandford*, 7 Monroe, 469,) that a conveyance of the wife's estate, between the time of the engagement and the marriage, was a fraud upon the marital rights of the husband, although he had notice of the conveyance before the marriage took place. But that decision cannot be sustained either upon principle or authority."

"Ignorance of certain facts, known to the other party, but concealed or misrepresented, is an essential ingredient to constitute fraud. If all the facts are known, there can be no deception; and if there be no imposition or deception, there cannot be any fraud. In conformity with this view it has been repeatedly decided, and seems to be the settled doctrine of the courts, both in England and in this country, that if the husband has notice or knowledge of the settlement or alienation, before the marriage, the transaction cannot be impeached; (*Terry, Adm'r, v. Hopkins, &c.*, 1 Hill's Ch. 15; *McClure v. Miller*, 1 Bailey's Eq. 108; *Fletcher and Wife v. Ashley, &c.*, 6 Grattan, 322; *St. George v. Wake*, 1 My. & Keene, 610; 7 Con. Eng. C. R. 188.)"

"In the last named case the Chancellor said, 'it might perhaps be affirmed, that excepting *Goddard v. Snow*, no case exists of a conveyance by the wife, though without consideration, being set aside simply because made during a treaty of marriage, and without the knowledge of the intended husband. Yet, it is certain that all the cases in which the subject is approached, treat the principle as one of undoubted acceptance in this court; and it must be held to be the rule of the court to be gathered from an uniform current of dicta, though resting

upon a very slender foundation of actual decision touching the simple point. As, however, everything depends upon the fraud supposed to be practised upon the husband, it is clearly essential to the application of the principle, that the husband should, up to the moment of the marriage, have been kept in ignorance of the transaction.'"

"But the question still arises, in this case, whether the husband should be regarded as having been kept in ignorance of the transaction or whether the knowledge of it at the time it was imputed to him, should be deemed sufficient to repel the legal presumption of fraud."

"As it is essential to constitute fraud, that the husband should remain ignorant of the transaction until the marriage ceremony takes place, it follows, as a necessary consequence, that his knowledge of it at any time previous to that period, will operate to prevent him from impeaching the conveyance on the ground of fraud. In reference to his knowledge, the law fixes but one period, and is the time of the marriage; it does not draw any nice distinctions with respect to the length of the time before that period, but considers any previous time as sufficient, and leaves the husband to act for himself, according to his own sense of justice and propriety. Until the marriage actually takes place, he is at liberty to retract, and the law justifies him in so doing, if he be notified that his intended wife has, without his assent, made a settlement of her estate that will be prejudicial to his marital rights. But if with this knowledge acquired at any time before the marriage actually takes place, he voluntarily complies with his previous

engagement, he cannot complain that he was deceived, nor will the transaction be deemed to be a fraud on his rights as a husband."

Knowledge after the marriage, and mere acquiescence, will not give validity to a settlement, otherwise fraudulent; *Logan v. Simmons*, 3 Iredell's Equity, 487, 500; nothing, after marriage, will be a confirmation, but such acts by the husband as are intended to confirm the arrangement, and are done under full knowledge that the original transaction could be set aside by him; *Manes v. Durant*, 2 Richardson's Equity, 404, 406.

There are some dicta, that a reasonable provision for children of a former marriage, if made *bona fide*, or under circumstances of good faith, would not be fraudulent and voidable by the intended husband; *Tucker v. Andrews*, 13 Maine, 124, 128; but it is certain

that such a settlement, to be sustained, must be reasonable and fair; *Logan v. Simmons*, 3 Iredell's Equity, 487; *Ramsay v. Joyce*, 1 M'Mullan's Eq. 237. And the better opinion, and one that has been repeatedly expressed in South Carolina, is, that if the settlement is without the knowledge of the husband, it makes no difference, whatever, in respect to its invalidity as against him, that it is upon a child by a former marriage; it is not the less deceptive, nor does it the less defeat his just claims and expectations; see per Johnson, J., in *Terry, Adm'r, v. Hopkins and others*, 1 Hill's Chancery, 1, 5; per Johnston, Ch., and Harper, Ch., in *Ramsay v. Joyce*, 1 M'Mullan's Equity, 237, 242, 251; per Harper, Ch., again, in *Manes v. Durant*, 2 Richardson's Equity, 404, 406.

WIFE'S EQUITY TO A SETTLEMENT.

*LADY ELIBANK v. MONTOLIEU.

[*341]

APRIL 16, 19, 1799. FEB. 19, 1801.

REPORTED 5 VES. 737.

WIFE'S EQUITY TO A SETTLEMENT.]—*Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the plaintiff's husband to him, it was declared he was not entitled to retain: but that the plaintiff's share was subject to a further provision in favor of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her.*

IN 1795, Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next of kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband, Lord Elibank and against Montolieu, *praying an account of the plaintiff's share, and that it may be settled on her and her family.*

The defendant Montolieu, by his answer claimed to retain Lady Elibank's share, towards satisfaction of the debt due to him from Lord Elibank by two bonds—one dated the 31st of May, 1783, for 12,217l. 9s. 9d.; the other, dated [*342] the 14th of November, 1794, for £1000—upon *the ground of the *provision made for the plaintiff by the settlement previous to her marriage with the defendant, Lord Elibank, in 1776.* By that settlement, the sum of £12,000 and £5000 New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease, for Lady Elibank for life, as a jointure, and in lieu of dower or thirds; and after the decease of both, in trust for the children. The sum of £4000 New South Sea Annuities was settled in trust for her separate use for life; and after her death, for her children; and £2000 £5 per cent. Bank Annuities for her separate use for life; and after her death, for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate, a power was reserved to charge £200 a year jointure, and £50 a year to each of his younger children, not exceeding in the whole £200 a year, under a condition, that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant Lord Elibank, by his answer, stated that a former Lord Elibank did charge to the full extent of that power.

The *Solicitor-General*, Mr. Grant, and Mr. Alexander, for the plaintiff.—The plaintiff desires an account of the personal estate of Lady Cranstown, and that a provision may be made for her. The defendant Montolieu insists, that is not to be done, because he is a creditor of her husband; contending that this case is out of the usual rule upon which the Court acts for a wife; and that there is no necessity to come to this Court, the fortune not being in Court nor under the control of the Court. In *Jewson v. Moulson*,¹ Lord Hardwicke held, that is not a necessary ingredient to enable the Court to act upon the property; and this Court would interfere to prevent the husband from obtaining it through a court of concurrent jurisdiction, as the Ecclesiastical Court; [*343] because that *Court cannot give the wife a remedy; though he doubted where it could be got at without the aid of this Court, or a court of concurrent jurisdiction; and he states that the rule is as old as the time of King Charles I., and cites a case from Tothill.² There have been many instances of an injunction to restrain the husband from proceeding in the Ecclesiastical Court, refusing to make any provision for his wife; and that

¹ 2 Atk. 417.

² Tanfield v. Davenport, Tothill, 179; Mealis v. Mealis, Hil. 1764; 5 Ves. 517, note to Blount v. Bestland.

Court having no power to compel him. The cases upon this subject are collected in Mr. Cox's note to *Bosvil v. Brander*;¹ and the result is, that, where the property is a subject of equitable cognizance, it is not material whether the wife, or the husband, or his representatives or general assignees, come for the aid of the Court. A wife in the situation of this plaintiff, therefore, may come to this Court for the purpose of having that to which she is entitled secured to her and her family, and part settled to her separate use. She is entitled to the same reference as was directed in *Worrall v. Marlar*, and *Bushman v. Pell*,² for the purpose of receiving a proposal for the settlement. In *Wright v. Rutter*,³ the Master of the Rolls observes, that it is now determined, that an action will not lie against the executor for property bequeathed to a married woman; and one of the reasons is, that the husband would get it free from the condition a court of equity interposes. It is not necessary, therefore, that the property should be in this court, or in the hands of trustees; for, if it was in the Ecclesiastical Court, or in the hands of an executor or an administrator, the interest of the wife is protected. That case related to a residue of personal estate in the hands of an administrator, for which it was not necessary to come here; but that was held not to make any difference. But, suppose the husband could sue at law, this defendant could not make this defence, that he will not pay, but will keep this fund in satisfaction of the husband's debt to him; for it is clear, at law, a creditor of the husband cannot set-off the husband's debt against the demand of the husband and wife, and being entitled in her right he must sue with her. Still less should he be permitted to retain in equity *upon that ground; for, where he is permitted to avail himself of the legal right, the right must be clear. [*344] There have been several other cases, in which the Court has acted upon a residue, just as if the property was in the hands of trustees. The accident, that Montolieu is the administrator, cannot alter the right of the wife. In *Ather-ton v. Knowell*, a husband, entitled in right of his wife to an income, being unable to maintain her, the Court referred it to the Master to see what it would be proper to allow her out of that fund: *Sleech v. Thornington*;⁴ *Wat-kyns v. Watkyns*, there cited;⁵ *Milner v. Colmer*;⁶ *Oglander v. Baston*.⁷

The only ground that can be taken against this bill is, that Lord Elibank became the purchaser of what might in future accrue to Lady Elibank; but there is no stipulation of that sort in the settlement, nor any indication of that intention. On the contrary, all the funds settled are her own, and a very scanty provision is made for her out of his estate. In *Burdon v. Blaster*, in 1775, the husband having become a bankrupt, the question arose between the assignees and the wife. The bill was filed by the assignees; and, though an objection was raised on account of the settlement, the wife obtained her equity. In *Pawlett v. Delaval*,⁸ it is laid down, that though the Court will make a decree, where the husband and wife are parties, where the wife has a proper settlement, to pay to the husband and wife, where the wife has not had a suf-

¹ 1 P. Wms. 458.² 2 Ves. jun. 676.⁶ 2 P. Wms. 639.² 1 Cox. 153; 1 P. Wms. 459; Mr. Cox's note.⁴ 2 Ves. 560.⁷ 1 Vern. 396.⁵ 2 Atk. 96.⁸ 2 Ves. 663.

ficient settlement the Court will not. As to the form of this suit, the wife sues alone, it is true, not with her husband; but that was the case in *Worrall v. Marlar*; if she has the equity against her husband, she must be entitled to sue.

The *Attorney-General*, Mr. *Mansfield*, and Mr. *W. Agar*, for the defendant *Montolieu*.—The objection to the form of the suit would merely occasion delay; and a bill would be filed in their joint names.

There is no case in which the Court has decreed against a trustee who had paid the husband without suit, that the wife had an equity to charge the trustee. The husband *suing in the Ecclesiastical Court, is suing per-
[*345] sons unwilling to pay him; and the trustee or executor, so sued, has come into this court to restrain him. That is quite a different case. Suppose the husband institutes a suit in the Ecclesiastical Court, and the trustee submits to pay, could the wife come here and say, it was in fraud of her equity? Lord Hardwicke, in *Jewson v. Moulson*, supposes a case, where the husband can come at the property without the aid of the Court. All the instances are, where the person has refused to pay, unless compelled by a court of equity. That gives the jurisdiction; and none can be produced, where the executor has been prevented from paying to the husband, if he chose to do so; or where, having paid to the husband, he has been charged as upon a breach of duty by reason of that payment, and made to refund. The case of *Worrall v. Marlar* is a singular one, and was influenced by the insolvency of the husband; but this plaintiff has a competent provision.

This case is certainly new, in the circumstances that the husband is debtor to the other defendant; but if he could have paid the husband, and the Court would not have made him refund, there can be no difference from his retaining against the husband. Suppose Lord Elibank had sued, and the equity of the wife, having a very large provision, was out of the question, this Court would never compel the administrator to pay that share to his debtor, unless the latter would allow the debt. This Court goes infinitely beyond courts of law, as to set-off. It would be strange to permit the wife to intervene against the administrator retaining, where she could not intervene to prevent his paying her husband, and the husband paying his debt out of that. *Burdon v. Blaster*, *Jewson v. Moulson*, and all the other cases, go upon the same ground; that the property was in the Court, and the husband, or his assignees, could not have it without the assistance of the Court. In this case the plaintiff comes to get it from the administrator, contrary to the plainest equity between him and her husband. There is no instance of a bill, by the wife against her
[*346] husband, to have *the property settled to her separate use; which is the object of this bill. This property, though subject to the equity of the wife, is the property of the husband: *Packer v. Wyndham*.¹

The *Solicitor-General*, in reply.—*Packer v. Wyndham* has nothing to do with this case. The wife being dead, and without issue, the question arose between the assignees of Mr. Packer, and the next of kin of Mrs. Packer;

¹ Prec. Ch. 412.

and it was insisted that, if the agreement had been carried into execution, Mr. Packer would have been entitled to the money: and she having been provided for during her life, and being dead, and not having left any children, the purpose for which the Court laid its hand upon the property, to secure a settlement, was at an end. The rule is clearly laid down in *March v. Head*,¹ and it is now a settled rule, that if a husband, in right of his wife, becomes entitled to any sum exceeding £200, this Court will not permit him to have it without a reference to the Master, for the purpose of a settlement, unless the wife consents that it shall be paid to her husband. The rule is clear, that, wherever the husband becomes entitled to sue in right of his wife, she must consent that he shall have it, or he is under the necessity of making a settlement, unless the Master is of opinion that the settlement already made by the husband is such as to answer all the purposes of the wife. *Packer v. Wyndham* is mentioned by Lord Hardwicke in *Bates v. Dandy*,² as consisting of many particular circumstances. *Worrall v. Marlar* has determined, that the wife may file the bill by her next friend; and there can be no doubt, that this plaintiff has an interest that will enable her to file such a bill for the purpose of having her property ascertained. Lord Elibank is passive. It is true, if he had assigned this to Montolieu, that might have bound the plaintiff; but he has not done so. This administrator stands in the character of trustee, and has no right to object, merely for his own advantage. If this bill should be dismissed the defendant would not be discharged, but on the death of Lord Elibank the right would survive, and she might file a new bill. It is not like a release. If a proper settlement has not been made, there [*347] must be a proposal laid before the Court, as in *Worrall v. Marlar*. That must be made by the husband, not by Montolieu, who has no more right than any other creditor.

LORD CHANCELLOR LOUGHBOROUGH.³—I wish to consider this case.

⁴ LORD CHANCELLOR LOUGHBOROUGH.—The only difficulty I had in this cause was upon the form of the suit: whether a married woman, by her next friend, could be the plaintiff in this court.

With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am very clearly of opinion the defendant had no right to retain.⁵ The administrator is trustee for the next of kin: the plaintiff being one of them, if she has an equity against her husband with regard to his money, that equity will clearly bar any

¹ 3 Atk. 720.

² 2 Atk. 207. See statement of *Bates v. Dandy*, from Reg. Lib., 1 Russ. 33, n., and a note of Lord Hardwicke's judgment, 3 Russ. 72, n.

³ Afterwards Earl of Rosslyn.

⁴ Feb. 19th, 1801.

⁵ See also *Carr v. Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 294; *Ex parte O'Ferrall*, 1 G. & J. 347.

right of retainer he can set up to the property, of which he became administrator.

With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against her husband, except by a bill, that objection, I think, does not weigh much. If the defendant, Montolieu, had done what would have been the natural thing and the right thing, and what he certainly would have done but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then, upon all the circumstances, it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank, without making [*348] a provision for her, for the provision upon her marriage *was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation, that, by circumstances to occur in his family, there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form—the bill coming on the part of the wife, instead of the husband.

Declare, that the defendant Montolieu is not entitled to retain, in satisfaction of the debt due from the defendant Lord Elibank to him, but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff, as one of her next of kin, is subject to a farther provision in favor of the plaintiff and her children, the settlement made upon her marriage being inadequate to the fortune she then possessed. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children, regard being had to the extent of her fortune and the settlement already made upon her.

MURRAY v. LORD ELIBANK.

JUNE 6. JULY 30, 31, 1804.

REPORTED 10 VES. 84.

Right of children to a provision out of the property of their mother, under a decree directing a settlement by the husband on her and her children, notwithstanding her death before the report.

Demurrer to the bill of the children was overruled.

THE bill filed by the infant children of Lord Elibank, stating the proceedings in the cause *Lady Elibank v. Montolieu*, and the decree, directing the Master to approve a proper settlement to be made by the defendant Lord Elibank on the plaintiff, Lady Elibank, his wife, and her children by him, regard

being had to the extent *of her fortune and the settlement already [*349] made upon her by Lord Elibank.

The bill farther stated, that before any report, Lady Elibank died intestate; and prayed that it may be declared, that the plaintiffs and the defendant Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of the 19th February, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Cranstown; and that it may be referred to the Master to approve of a proper settlement to be made by the defendant Lord Elibank upon the plaintiffs and the defendant Alexander Murray, being all the children; regard being had to the extent of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer.

Mr. *Alexander* and Mr. *Cooke*, in support of the bill.—The question is, whether the children are entitled to sustain a supplemental suit, so as to have the benefit of the decree. This right is purely a creature of the courts of equity of this country. Upon principle, why should the interest, given by the decree to particular persons, beyond the interest of the parent, depend upon the accident of death? But the interest of the children rests most safely on the uniform practice. In *Rowe v. Jackson*,¹ it was said by Mr. Madocks, and assented to by the Court, that, where a husband sues for his wife's fortune, and is decreed to make a proposal for a settlement, and the wife dies, the husband shall be compelled to carry it into execution for the children; and he cited a manuscript case for that, and observed, that the same thing was said by Lord Thurlow, in 1779, upon a motion by Mr. Mansfield; but it is otherwise if the wife dies before the decree. It is now decided, that the creditors of the husband are exactly in the same situation. An order was made by Lord Alvanley, enforcing the equity for the children, after the death of the wife, even against the assignment of the husband. It does not appear whether the husband had *carried in a proposal before the death of the wife, [*350] or before the assignment; but that cannot make a difference, as the mere proposal could not bind more than the decree, in obedience to which it is made. The rule is now clearly settled, that the children have, through their mother, an interest in her fortune. The uniform language of the Court is, that the husband shall go before the Master, and lay proposals for a settlement upon the wife and children. It appears, from *Hearle v. Greenbank*,² that Lord Hardwicke so considers it, and seems to think that a decree might be made after the death of the wife, the children, even after her death, having a right against the father for a provision. But here is a decree, establishing this right of the children in the life of the wife, and the settlement is to be considered as made at the date of the decree, and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin v. Mitchell*, the case before Lord Thurlow in 1779, the Court, after

¹ 2 Dick. 604, stated also from a manuscript note of Mr. Romilly.

² 3 Atk. 695. See page 717.

the death of the wife before a settlement, carried the proposal into execution against an assignment to a creditor.

Mr. *Richards* and Mr. *W. Agar*, in support of the demurrer.—In the case, either of a sum of money, the property of a married woman, which belongs to her husband in her right, or a bond or note, a chose in action, or what Lord Alvanley called a chose in equity, which the husband may recover, but, if he does not, will survive, the debtor may pay the husband who may release him. It is his property, subject to the contingency of survivorship. A court of equity will not assist him, unless he will make a settlement; but, if the wife does not desire a settlement, the Court will not make one for her; and it has been held, that the Court cannot refuse to the wife the power of giving the property to her husband. It is the property of the husband, to be extended to the wife and children, if she thinks fit; but the Court would not, upon her desire in court, permit her to give it to any one else, as she might, if it was hers, independent of the equity the Court attaches upon it. Having not the [*351] property, but an *equity only, she has no interest to give up. There is no analogy, therefore, to the case of a fine, in which an interest does pass. The trustee is justified in paying the husband; but, if the wife had an interest in it, he would be answerable for that to her.

But, supposing, the wife to have some interest, can the children have any? If she is dead, they cannot come here for a settlement: *Scriven v. Tapley*.¹ It is said the Court has, by the decree, given them an interest. They were not parties before the Court at the time that decree was made. They have no more interest in the property than a stranger; but are considered by the Court in a manner comprehended in the mother, while she exists, who is therefore allowed to extend her plan of provision to them, but not as distinct and separate objects, having an interest independent of her. Suppose Lady Elibank had waived the order for a settlement, and desired the money to be paid to her husband, the Court, considering the equity hers, would have held, that she might disappoint her children. The proposal, not completed and carried into execution by the Court, is only an offer; and, if the wife dies before it is carried into execution, the husband is remitted to his legal right. In all these cases, everything is given with reference to the wife—nothing independent of her. Only two authorities are produced for making any order for the benefit of the issue of the marriage after the death of the wife; the one, *Rowe v. Jackson*, a very short note; the other, an order, made by Lord Alvanley, upon petition, by some slip in the absence of the assignees, who were not parties, and without even inquiring whether they had any objection to it. The property was very small, which perhaps might have had some influence. The Court cannot say what proportion the wife would have settled upon herself, and what upon her children. In *Macaulay v. Philips*,² it was held, that the decree gave no interest to the husband, but it survived to the wife; and Lord Alvanley says, if she died, notwithstanding his proposal, he would have

¹ Amb. 509; 2 Eden, 337.

² 4 Ves. 15.

been entitled. That opinion was given by Lord Alvanley with great *deliberation, and takes the distinction between a settlement approved [*352] by the Court and a mere proposal.

LORD CHANCELLOR ELDON.—There are two points upon this demurrer: one of form, the other upon the merits. If the wife has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated, that, with reference to the point of settlement, the party had waived it; and I apprehend, it will be found that she may, between the period of the order and her death, waive the benefit of that order.¹ The question then is, if, between the date of the order and her death, she does not, by some authoritative proceeding, express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and, as to the latter, whether the assignees of the husband were heard or not.

² Mr. *Alexander*, for the plaintiffs, stated the case of *Martin v. Mitchell*, from the Register's book, in which the motion before Lord Thurlow, in 1779, was made. In 1777, a decree was made for an account, and that what should be found due to Hannah Fearn should be paid into court, to her separate account, with the usual direction for a settlement. The sum of £3000 was by the report, stated to be due, and was carried over. After her death, in 1779, the motion, referred to in *Rowe v. Jackson*, to pay that sum to the husband, was made, and refused; and an order was made, directing the husband to go before the Master, and execute the order for a proposal. That proposal was carried into effect, by petition, at the Rolls; and, under another order, in 1803, stating all the proceedings, the children were paid.

It appears from these cases, that the equity of the wife *does survive to the children; and their only mode of availing themselves of [*353] this interest is by supplemental bill. The case of *Macaulay v. Philips*, is not applicable. The dictum of Lord Alvanley would have been inaccurate, if there had been any children; but there were no children. It amounts to no more than that the proposal did not sever the joint-tenancy between the husband and wife. If, as your Lordship has observed, the wife can waive her right under the order for the benefit of her children and herself, that cannot affect a case where she has not waived it, and is dead.

LORD CHANCELLOR ELDON.—The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case to which Mr. Madocks

¹ See *Lloyd v. Williams*, 1 Madd. 466.

² July 30th, 1804.

alluded was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord Alvanley, in *Macaulay v. Philips*, has laid down, that, after a bill filed the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the bar, at least. But that case is the last; and I think, contains very wholesome doctrine upon that point. I should have supposed, a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. The wife is entitled to call for a declaration, that she then *had a right to a provision for herself and her children; and [*354] yet it is clear, after such a bill filed, she might come into court and consent to her husband's having the fund entirely under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed, that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay v. Philips*, proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case, certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state, that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here; but, when at the bar, I was frequently concerned in this final arrangement, that, notwithstanding such order by the original decree, upon further directions the wife came, consenting that the fund should be taken out of court, and was permitted to do so. If, therefore, the issue have a right against the father, it is dependent altogether upon the will of the mother. There is, perhaps, some difficulty in making all the principles of the Court, upon this subject consistent with the notion of such right in the children; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe v. Jackson*, (and I can, from my own memory, confirm both accounts of that case,) upon an application, where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. Madocks stated, that it was not according to the practice, after that order, to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in

that instance peculiarly to be regarded, *as he referred to another case, in which Lord Thurlow was satisfied that such was the rule, and [*355] acted upon it. But it does not rest there; for in a subsequent case it is clear from the Register's Books that Mr. Mansfield, after the death of the wife, moved that a sum of money should be paid to the husband; and Lord Thurlow refused that application, upon the ground that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord Alvanley did upon a petition; whether regularly or not, will not shake the doctrine, considering what had been done before. In that instance, Lord Alvanley would not deliver out that small sum, little more than £300, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing, because it is difficult to say, ab ante, it should be done, and that I am to set up a different course of practice. I agree also with Mr. Alexander as to the dictum of Lord Alvanley in *Macaulay v. Philips*, which construction is necessary to make him consistent; and attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper; otherwise, to be left standing for their benefit at her death.

Next, as to the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, "under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer, therefore, ought to be overruled. If, upon the hearing of the cause, this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing.

Demurrer overruled.

*MURRAY v. LORD ELIBANK.

[*356]

MAY 21, 22. JULY 21, 1806.

REPORTED 13 VES. 1.

Right of children to a provision out of the property of their mother, under a decree directing a settlement on her and her children; notwithstanding her death before the report, no act being done by her to waive the equity.

IN this cause, the demurrer of the defendant Montolieu having been overruled, answers were put in, and the cause came on to be heard.

Mr. *Alexander* and Mr. *Cooke*, for the plaintiffs, relied upon the opinion expressed by the Lord Chancellor upon the demurrer.

Mr. *Richards* and Mr. *W. Agar*, for the defendant *Montolieu*.—This is a very important and a new question, which the Lord Chancellor did not profess to decide upon the demurrer. The opinions that have been expressed show the notion that has prevailed as to the practice, but there is no decision upon it. The order by Lord *Alvanley* would not have been made if the Court had been aware that the creditors were not parties, the husband and wife having assigned the fund, to secure a debt; and it was delivered out of Court upon the statement that it was very small, the creditors not being parties, and no contest. The cases of *Martin v. Mitchell* and *Rowe v. Jackson* were also upon petition, and no contest. It is true, this equity is the creature of this Court; it has been held, both here and by Lord *Eldon*, that it has no analogy to a fine, and it does not arise if the husband gets the property, if it is *not intercepted in the way; but if the order of the

[*357] Court is necessary, either upon the bill of the wife, which must now be admitted, or of the husband, the Court will make him do what is just; otherwise, there is no jurisdiction against him, and he cannot be held guilty of a contempt. He may run his life against hers. The Court goes no further than refusing to assist him, unless he will make a provision. The Court does not act upon the interest of the wife; for, if so, they would give it to her. The Court has no dominion upon the subject, but exercises a sort of arbitrary authority, there being no interest in her in point of law. The Court cannot compel him to give her an interest, but merely refuses to interfere in his favor, except upon certain terms. There is no doubt that, after a reference directed, as to a provision for the wife and children, she may come the next day, and, by her own act of consent, defeat that provision for her children, though without her consent the Court would not give the fund to her husband; but there is no jurisdiction to prevent her giving it to him. Mr. Justice *Buller* attempted it, and refused to take the consent; but Lord *Thurlow* held, that he could not refuse it, and, with great reluctance, gave the money to the husband. The power which the wife has in that way to defeat the reference in favor of the children, shows clearly that the reference is directed upon her account, not theirs.

In the case of *Alexander v. M^cCulloch*,¹ it was never thought possible to give the property to the wife; but each came, from time to time, to get a little; and Lord *Thurlow* fed the husband occasionally, in order to induce him to make a proposal. But she might have come to give it away to him; and, in fact, they did at last agree, as they did also in *Macaulay v. Philips*.² The protection subsists only as long as the wife chooses. When she is gone, the equity, which is attached to her, and to her only, must be gone also. What interest can the children have against their father? Are they purchasers as against him? He is a purchaser of his wife's choses in action by

[*358] the act of marriage, completed by the administration. *What right have the children, as against their father, to insist upon a part of the fortune?

¹ 2 Ves. jun. 192, cited.

² 4 Ves. 15.

In *Scriven v. Tapley*,¹ the Lord Chancellor held this equity personal to the wife, reversing a decree at the Rolls in favor of the children. *Bond v. Simmons*,² also, is an authority that the wife surviving is entitled to the whole; and the consequence is, that by her death the equity is gone, and the children cannot file a bill to bring the money into court. These authorities outweigh the loose dicta upon the petition, and without contest, in favor of this bill; and it stands upon no foundation of principle.

Mr. *Alexander*, in reply.—The opinion of Lord Eldon is expressed in favor of this bill. It is supposed that the plaintiffs must contend, that this equity would bind the wife herself, if she chose to relinquish it. But, admitting that, notwithstanding an order for a settlement, if the husband dies, the wife surviving is not bound to make a settlement, can it be said, therefore, the husband is not bound? There is no doubt, the equity is that of the wife; and she may, in any stage, come into court, and relinquish the equity both for herself and her children.

[Master of the Rolls, (Sir *W. Grant*.)—Down to what time?]

To the time at which the settlement is actually made. It is an equity, in opposition to the husband's legal right, upon which it is imposed as a burthen in favor of herself and those in whose favor she may think fit to apply; and which she may at any period abandon. There is nothing inconsistent in her right to relinquish that claim, which she has on behalf of herself and her children. But after her death the Court will suppose she died with the intention to insist upon it for her children; in whose behalf it shall subsist after her death, unless expressly waived during her life. After the order made upon her application, and not waived, which by the event of her death is now become impossible, the right of the children is vested; the effect of the order being a specific lien upon the particular fund, in respect of which the husband makes the *application, notwithstanding the general terms of the [*359] order.

The MASTER OF THE ROLLS, (Sir *W. Grant*.)—This case arises out of the case of *Lady Elibank v. Montolieu*; by the result of which the right of Lady Elibank to maintain a suit for a settlement against her husband and the administrator was established; and it was determined, that the claim which the administrator had, as a creditor of her husband, did not stand in the way of her right.

The question now, Lady Elibank having died before anything was done under the decree, by which the Master was directed to approve a settlement upon her and the children, is, whether the children have a right to the benefit of that decree?

It is contended, on the part of the defendant Montolieu, that the right to demand a settlement is a personal equity, attaching to a married woman, and in no sense the right of the children; for, if it were, the mother could not relinquish it, as it is admitted she may; that, though the children may derive

¹ Amb. 509; S. C., 2 Eden, 337.

² 3 Atk. 20.

a consequential benefit from having the settlement made upon their mother extended to them, yet, when her right is out of the question, as it is in this instance by her death, there must likewise be an end of theirs. Upon the other side it was contended, that, when a settlement was, by the decree, directed to be made upon the mother and the children, the right of the children is so far fixed, that the Court will recognize and carry it into effect, notwithstanding her death, provided no act was done by her to waive the benefit of it. It seems to be assumed in the argument, both here and before Lord Eldon, that it was competent to the mother to waive the settlement at any time before it was actually completed; that is, even after a proposal given in by the husband. Lord Hardwicke, however, determined the contrary:¹ stating, that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does [*360] not directly apply *to this case; as, I believe, no proposal was laid before the Master in this case.

With regard to this equitable right which a married woman has in this Court to a provision out of her own fortune, before her husband reduces it into possession, it stands upon the peculiar doctrine of this Court. It is vain to attempt, by general reasoning, to ascertain the extent of that doctrine. We must look to the practice of the Court itself. It is sufficient to say, the habit of the Court has always been of itself, and without any application previously made by the married woman, to direct an inquiry, when money has been carried over to her account, whether any settlement has been made; for the money is carried over subject to that inquiry, and the constant habit has been to direct a settlement, not upon the wife only, but upon the children also. I am not aware that she has in any case been permitted to say she claims a settlement for herself, but not for her children. She has the option not to have any settlement made; but if a settlement is to be made, it is always directed for the benefit of the wife and the children. When she comes to give up her right to her husband, she is examined whether she wishes for any settlement. If she does not desire any settlement, then the money is paid to her husband. If she desires a settlement, the settlement is upon her and the children.

The question has been made, whether the children have any substantive and independent right to claim a settlement after the death of their mother, if a settlement was not directed during her life? In the case of *Hearle v. Greenbank*,² Lord Hardwicke appears to state that as a doubtful point; and that he conceived there was no case determining that the children have such right. His Lordship seems not to have recollected the case that was before him, *Grosvenor v. Lane*,³ in which he took notice of such a decree, though the question before him was not upon the point. That was the case of the second husband, endeavoring to reduce his wife's fortune into possession; and the Court directed a settlement upon the child, the immediate point in the

¹ Anon., 2 Ves. 671. See, however, *Lloyd v. Williams*, 1 Madd. 466, in which the opinion of Lord Eldon is recognized and approved of.

² 3 Atk. 695. See page 717.

³ 2 Atk. 180.

cause before Lord Hardwicke *turning upon the right of the child absolutely to the whole legacy, in consequence of an appropriation of it by the second husband. [*361]

In a subsequent case, *Scriven v. Tapley*,¹ Sir Thomas Clarke, as a matter of course, taking it as the ordinary equity, directed a proposal by the representative for a settlement upon the child, the wife being dead. That part of the decree, it is true, was reversed by Lord Northington; but the opinion, that children have that equity in their own right, and independent of any claim through the mother, prevailed so much, that, notwithstanding that reversal, in a year and a half afterwards, Sir Thomas Sewell, in *Cockel v. Phips*,² made precisely the same decree. Every one knows how intimately Sir Thomas Sewell was acquainted with the practice of the Court.

There is, therefore, a great deal of authority in opposition to that decision by Lord Northington, in *Scriven v. Tapley*, all weighing strongly in favor of the right of the children claiming under a decree in favor of their mother; for, if their right to come with an original demand for a settlement upon them, their mother having died without demanding any settlement, is established, a fortiori, if she has claimed, and the Court has directed a settlement, the children must be entitled. As to that there are very few cases, but all are one way. The doctrine, as far as there is any memorial of it, is uniform; and it is upon the uniform habitual doctrine of the Court, that you are least likely to find cases; and in the cases that have occurred, the Court has interposed, not upon any controversy between the parties, but upon its own doctrine. In *Martin v. Mitchell*, the husband claimed the fund, and the Court would not permit him to take it, but directed the former order, for a settlement upon the wife, to be prosecuted. In *Rowe v. Jackson* a similar application appears to have produced a similar refusal; and both these cases were before Lord Thurlow. No ground is laid upon which I should be induced to depart from the established doctrine. We can look nowhere but to the practice of the Court for the extent of that doctrine. Here we find it. *There is no instance in which the husband has succeeded in getting money out of court without making a provision for the children. [*362]

These plaintiffs, therefore, are clearly entitled upon their supplemental bill. It is not necessary to determine, whether they could have got at it by any other mode.

By marriage the husband becomes entitled to receive the rents of the wife's real estates during their joint lives, and he becomes absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by obligation, contract, or otherwise, if he reduce them into possession; or if he

¹ Amb. 509; 2 Eden, 337.

² 1 Dick. 391. See, however, *Lloyd v. Williams*, 1 Madd. 464, where it appears that the point said to have been decided by Lord Northington, in *Scriven v. Tapley*, did not arise.

do not, as administrator of his wife, if he survive her ; and he becomes also entitled to her chattels real, with full power to alien them, though if he die before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they will survive to the wife. See Gilb. Ten. 108 ; Co. Litt. 67, a., 300, a., 351, b., 351 ; 1 Roll. Ab. 342, pl. 1 ; Co. Litt. 185, b.

The husband acquires this interest in the property of his wife in consideration of the obligation which, upon marriage, he contracts, of maintaining her and his children by her ; but the common law is defective, inasmuch as it possesses no means of ensuring the performance of the duty imposed upon the husband, since, in many cases, he might have it in his power to alien all the property to which he is entitled *jure mariti*, or upon his becoming bankrupt or insolvent it would vest in his assignees for the benefit of his creditors, and thus his wife, however great may have been her fortune, might, with her children, be left utterly destitute. Courts of equity have, from a very early period, endeavored to remedy this deficiency in the common law, by giving to the wife, in certain cases, a right to a provision out of her own property ; this right is called her equity to a settlement.

The jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was first assumed in cases where it was necessary for them to apply to the Court for assistance in order to obtain possession of the property of the wife ; which assistance the Court, acting upon the maxim, *that he who seeks equity must do equity*, withheld until an adequate settlement was made upon the wife : *Bosvill v. Brander*, 1 P. Wms. [*363] 459. In consequence of this *origin of the jurisdiction, it was thought, that the equity of a wife to a settlement was confined to those cases in which the husband, or those claiming under him, were plaintiffs. See *Bosvill v. Brander*, 14 P. Wms. 460. However, since the decision of *Lady Elibank v. Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff : *Sturgis v. Champneys*, 5 My. & Cr. 105 ; *Eedes v. Eedes*, 11 Sim. 569 ; *Hanson v. Keating*, 4 Hare, 6 ; and see *Osborn v. Morgan*, 9 Hare, 434 ; *Newenham v. Pemberton*, 1 De G. & Sm. 644, in which case the Court refused to take a bill off the file, although it was filed by an infant plaintiff in her maiden name by her next friend, whereas she was in fact clandestinely married, and the Court directed a settlement, although the bill did not expressly pray to that effect.

As against whom the equity of a wife to a settlement is binding.—The equity of a wife to a settlement is binding not only upon her husband, but also upon his assignees in bankruptcy, under the Insolvent Debtors' Act, or under a general assignment for the payment of his debts : *Jewson v. Moulson*, 2 Atk. 420 ; *Burden v. Dean*, 2 Ves. jun. 607 ; *Pryor v. Hill*, 4 Bro. C. C. 138, and notes by Belt ; *Oswell v. Probert*, 2 Ves. jun. 680 ; *Sturgis v. Champneys*, 5 My. & Cr. 97. It was, however, at one time doubted whether it was binding upon the assignee of the husband for valuable consideration ; but Lord Alvanley, in the case of *Macaulay v. Philips*, 4 Ves. 19, after fully considering the authorities, stated his opinion to be in favor of the claims of the wife.

"Many cases," said his Lordship, "upon this point have been before me, which have put me under the necessity of considering very much the rights of the wife, and I am clearly of opinion the doubt respecting the assignment of the husband for a valuable consideration of the wife's equitable interest, was not well founded, (with the single exception, perhaps, of a trust of a term of years of land,) upon which, perhaps, there may be some doubt; but subject to that, I am clearly of opinion that an assignment for a valuable consideration will not bar the equity of the wife, and it would be strange if it did, since by the determinations in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined that an action does not lie; and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this Court upon the wife's interest would be very singular if the husband, *not being [*364] entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt, and it never was decided, that the husband could, by such assignment, or any other means, deprive her of her equity." See also *Scott v. Spashett*, 3 Mac. & G. 599; *Marshall v. Gibbings*, 4 Ir. Ch. Rep. 276.

It will be seen hereafter that the doubt thrown out by Lord Alvanley, as to whether a wife is entitled to a settlement out of her trust term, is unfounded; the assignee, however, for value of the husband has in other cases (which will be noticed hereafter,) been considered to stand in a more favorable position than either the husband or his general assignees.

Although an executor or administrator has a right to set off a debt due to the estate, from a husband, against any legacy or share under the intestacy to which his wife is entitled, (*Hall v. Hill*, 1 Dru. & War. 109,) the wife's equity to a settlement is paramount to the right of set-off, which cannot be enforced to the prejudice of the wife's equity (if any) to a settlement. If, for instance, the wife is entitled to have the whole fund settled upon her, then the right of set-off or retainer will be completely barred; if she has only a right to have part of the fund settled, the right of retainer or set-off will be to that extent barred. See *Carr v. Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 294; *Ex parte O'Ferrall*, 1 G. & J. 347; *M'Mahon v. Burchell*, 3 Hare, 97; 5 Hare, 325; *Reeve v. Rocher*, 1 De G. & Sm. 626; *Lee v. Egrement*, 5 De G. & Sm. 348; *M'Cormick v. Garnett*, 2 Sm. & Giff. 37. It is presumed that Lord Loughborough, when he observed in the principal case, (p. 347, ante,) "That if the plaintiff had any equity against her husband with regard to the money, that equity would clearly bar any right of retainer that the administrator could set up," merely meant, that the bar to the right of retainer was co-extensive with the wife's equity.

Out of what property the wife can claim her equity to a settlement.—Where the property of the wife is equitable, and consequently not recoverable at law, it is clear that the husband, or his assignees, will only obtain it upon the terms of making a settlement upon the wife and her children, if she require

one to be made: *Milner v. Colmer*, 2 P. Wms. 639 ; and even where the property, though in its nature legal, becomes, from collateral circumstances, the subject of a suit in equity, it appears that the wife's equity to a settlement will attach. This is clearly laid down in the important case of *Sturgis v. Champneys*, 5 My. & Cr. 97, where Lord Cottenham, in a most *elaborate [*365] judgment, considers all the authorities upon the subject. In that case the *provisional assignee* of Sir Thomas Champneys, an insolvent debtor, whose wife, Lady Champneys, was entitled *for her life* to real property, of which the legal estate was outstanding in mortgagees, was obliged to file a bill to make his title (subject to the incumbrances) effectual. Upon Lady Champneys claiming her equity to a settlement, it was contended that her life-interest in the estates could not be considered as an equitable interest merely on the ground that the legal estate was outstanding, and that the Court had never made a provision for a wife out of such an interest as the husband in that case had, and that it was not established that the wife's equity extended to the rents of real estate. Lord Cottenham, however, reversing the decision of Sir L. Shadwell, V. C., (4 Sim. 82,) held the wife entitled to a settlement out of the rents of her life-estate. "If," said his Lordship, "the authorities support Lady Champney's equity as a condition which this Court imposes as the price of the assistance which the assignee asks of this Court, the nature of the estate of the wife in the subject-matter in contest does not seem to be important.

"Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favor of the wife. In *Bosvill v. Brander*, 1 P. Wms. 458, in which the wife was mortgagee in fee, and the decision was against her, she being plaintiff, (and then a widow,) the Master of the Rolls, recognizing the rule, says that 'it might have been a matter of different consideration if the assignee had been plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing of which equity would hardly have lent any assistance.'

"Many cases followed, in which the principle was recognized ; and in *Burden v. Dean*, 2 Ves. jun. 607, the assignees of a bankrupt husband filed a bill, praying that they might be entitled, during the joint lives of the bankrupt and his wife, to the income of certain freehold, leasehold, and personal estates, to which the wife was entitled for life ; upon which the Master of the Rolls said, 'I have no objection to what they can get at law, but if they come into this Court, I will not extend the arm of the Court to give them any other part of her property, without a consideration for it ; therefore let it be referred to the Master, that they may lay proposals before him.' It was said that the order in this case was by consent. That I think immaterial, as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value.

[*366] *"In *Oswell v. Probert*, 2 Ves. jun. 680, the husband having become bankrupt, Lord Rosslyn said, 'Where persons claiming in right of the husband are obliged to come into an equitable jurisdiction, to obtain the benefit of any part of the property, the destination of which is for the enjoy-

ment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve. Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both; and in *Ball v. Montgomery*, 4 Bro. C. C. 338, the equity of the wife was put upon the same ground. In *Brown v. Clark*, 3 Ves. 166, Lord Alvanley said, the assignees of the husband 'must make a provision for the wife before they can call it out of this Court.' In *Freeman v. Parsley*, 3 Ves. 421, Lord Rosslyn directed a provision for the wife against the assignees of her husband upon the same principle. In *Mitford v. Mitford*, 9 Ves. 87, Sir W. Grant said, 'It is upon the ground that the assignees want its assistance to reduce the property into possession, that this Court imposes upon them the condition on which alone it would have assisted the husband to obtain possession.' In *Wright v. Morley*, 11 Ves. 12, Sir W. Grant said, 'In *Pryor v. Hill*, 4 Bro. C. C. 139, it was contended that the equity of the wife did not extend to the case of a life-interest, upon the principle that the husband becomes absolute purchaser of that upon the marriage, in consequence of the obligation to maintain his wife thereby contracted. That argument, however, did not prevail. The life-interest passes to the assignees, subject to the ordinary equity for a settlement.' In *Elliott v. Cordell*, 5 Madd. 149, Sir J. Leach, though he thought that the title of a particular assignee of the property of the wife then in dispute was good against her claim to maintenance out of it, yet said, that if the husband had been bankrupt, the Court would have fastened upon his assignee the obligation of maintaining the wife out of any property of hers; which must be understood to assume the case of the assignee's applying for the assistance of this Court to obtain such property.

"From these authorities, and many others which recognize the same principle, it appears that the equity which this Court administers in securing a provision and maintenance for the wife, is founded upon the well-known rule of compelling a party *who seeks equity to do equity*; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform *that duty. If the life estate be attainable by the husband or his assignee at law, the [*367] severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this Court, in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make, where the assignees of the husband are applying to this Court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the

recovery at law is prevented only by the existence of a prior legal trust estate? It happens, however, that in *Oswell v. Probert*, before referred to, the estate of the wife was the same as in this case. The testator had devised his estate to trustees in fee, upon trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life. The estate had, indeed, been sold to pay the prior charges: but it being evident that the trust was subsisting, and the legal estate in the trustee, the Court said, that the assignees were in the place of the husband not maintaining the wife, and declared that a provision was to be made for her."

In *Freeman v. Fairlie*, 11 Jur. 447, where a sum of money, being rent of real estate, (not, as it seems, equitable,) to which a husband was entitled jure mariti, was paid into court by an agent, Sir L. Shadwell, V. C., upon the authority of *Sturgis v. Champneys*, held that the assignee of the husband, (who was insolvent,) was not entitled to it, without a settlement upon the wife.

Notwithstanding the doubt thrown out by Lord Alvanley in *Macaulay v. Philips*, 4 Ves. 19, it is now clearly settled, overruling what is supposed to have been decided in *Sir Edward Turner's case*, (1 Ch. Cas. 307; 1 Vern. 7; see *Sanders v. Page*, 3 Ch. Rep. 223,) that a wife will be entitled to a settlement out of her trust term in land, not only as against her husband, but also against his assignee for valuable consideration. Thus, in *Hanson v. Keating*, 4 Hare, 1, where a husband and wife assigned, by way of mortgage, the equitable interest of the husband in right of his wife in a term of years, the mortgagee filed his bill against the husband and wife, and the trustee of the legal estate, for a foreclosure *and assignment of the term; it was held by [*368] Sir J. Wigram, V. C., upon the authority of *Sturgis v. Champneys*, although contrary to his own opinion independent of that case, that the wife was entitled to a provision for her life, by way of settlement, out of the mortgaged premises. "I am clear," observed his Honor, "that I am not bound, in this case, to impose upon the plaintiff the terms required by the defendant, only because he is plaintiff, (for that was the argument at the bar.) The question is, what are the equitable rights of the parties, independently of their relative positions on the record? *Sir Edward Turner's case*, 1 Vern. 7, if it be law, answers this question. Now it is true, that some judges have thought the resolutions in that case questionable; but it is equally true, that they have considered it as binding upon all courts until the House of Lords should alter its own resolutions; *Pitt v. Hunt*, 1 Vern. 18; *Jewson v. Moulson*, 2 Atk. 417; and unless I am altogether under a mistake, *Sir Edward Turner's case* has always been, and is at this day, considered law by conveyancers, and is acted upon accordingly. And the more strong has been the dissent from the resolutions in that case, the more do the judges who express that dissent affirm the authority of the case by following it. I believe the understanding of the profession, prior to the decision of *Sturgis v. Champneys*, to have been that *Sir Edward Turner's case* was in accordance with the principles of the Court: and I advert to that understanding the more, not only

because the Vice-Chancellor of England concurs in it, but because I know the learned editor of Mr. Roper's book on the law of Husband and Wife always lamented the decision in *Sturgis v. Champneys*, as having, in his opinion, unsettled the law. In some cases of mere personalty there is no doubt of the wife's equity; but, prior to *Sturgis v. Champneys*, the opinion of the profession had, I believe, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. In the case of *Burdon v. Dean*, 2 Ves. jun. 607, the order was made by consent; and Lord Cottenham notices that circumstance in *Sturgis v. Champneys*. I shall not, however, decide this case without attentively reading *Sturgis v. Champneys* in private."

On a subsequent day, his Honor, deciding in favor of the wife, observed, "At the close of the argument in this case, I stated what my understanding of the law was; and I reserved to myself the duty only of examining the case of *Sturgis v. Champneys*, to determine whether I could act in this case upon my individual opinion as to the law, without directly impugning the plain tenor of Lord Cottenham's judgment in that case. My opinion *is, that I cannot do so; and, therefore, in deference to that judgment, I [*369] shall follow it, although, if that case were out of the way, I should probably have decided otherwise. There would be no difficulty in distinguishing the facts of this case from those in *Sturgis v. Champneys*; but the reasoning in that case would remain, and I cannot disregard it."

The estate of a feme covert tenant in tail in possession, subject to a term to secure a jointure, has been held to be equitable during the continuance of the term, for the purpose of entitling her to a settlement on the bill filed by her. See *Wortham v. Pemberton*, 1 De G. & Sm. 644. "Although," said Sir J. L. Knight Bruce, V. C., in that case, "the plaintiff and her husband, or he in her right, may have the immediate legal freehold, there is a legal title which prevents the enjoyment except by means of a court of equity, and renders the title to the rents equitable so long as the term lasts; and it appears to me, that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself and the husband, or until the determination of the term; the remaining question being, whether if the term shall by the clause for ceaser, determine during the joint lives, the settlement can endure beyond that period." His Honor heard the plaintiff's counsel in reply on this question, and held that the settlement could not be made beyond the jointure term.

Although the Court might allow the wife the income of her property, it by no means follows, when the property out of which she claims a settlement is in the hands of a mortgagee, that he will be allowed by the Court, as against the assignees of the husband, what he may have paid to the wife, out of the income of the property. Thus, in *Clark v. Cook*, (3 De G. & Sm. 333,) a husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums of insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off,

The husband took the benefit of the Insolvent Debtors' Act. It was held by Sir J. L. Knight Bruce, V. C., in a suit for redemption, instituted by the assignee of the husband against the mortgagee, that the latter was chargeable with the surplus rents which he allowed to the insolvent's wife for her maintenance. "I cannot help suspecting," said his Honor, "that the wife might have had all that has been paid to her if a proper application had been made to the Court. It is a hard and peculiar case, and there must be no costs on either side."

Where, however, a person entitled, *jure mariti*, to the legal interest in leaseholds, mortgages *them, the wife has no equity to a settlement there-
 [*370] out, as against the mortgagee seeking foreclosure or sale, (*Hatchell v. Eggleso*, 1 Ir. Ch. Rep. 215,) but if the proviso for redemption in such a case is on the re-payment of the sum advanced, by the husband, (who has become insolvent,) and his wife, the power to redeem must be given to her as well as the insolvent's assignee: *Hill v. Edmonds*, 5 De G. & Sm. 603.

Although it was once doubtful, it seems to be now fully established, that a wife is entitled to a settlement out of a life interest in equitable property to which her husband is entitled in her right, as against his assignees, upon his becoming bankrupt or insolvent. Thus, in *Lumb v. Milnes*, 5 Ves. 517, a wife having a life interest in the dividends of a fund, was held entitled to a settlement as against the assignees of her husband, who was a bankrupt. The same was held, also, in *Brown v. Clark*, 3 Ves. 166, and *Jacobs v. Amyatt*, 1 Madd. 376, n.; and in *Sturgis v. Champneys*, 5 My. & Cr. 97, which has been already given at considerable length, Lord Cottenham held, that the wife was entitled to a settlement out of the rents of lands devised to her for life; see also *Vaughan v. Buck*, 1 Sim. N. S. 284.

The wife is also entitled to a settlement or maintenance out of her equitable life interest when she is deserted by her husband. See *Gilchrist v. Cator*, 1 De Gex & Sm. 188, and cases cited post, p. 389, 390.

It has, however, been held by Sir L. Shadwell, V. C., that the wife is not entitled to a settlement out of a life interest when she is living with and is maintained by her husband, who is neither bankrupt nor insolvent. Thus, in *Vaughan v. Buck*, 13 Sim. 404, a married woman, having a life interest in a fund in court, presented a petition, praying that a portion of the income, and of the arrears of it, might be settled to her separate use. It seems she was living with her husband and was maintained by him; but, as she alleged, in a manner very inadequate to her fortune, as he was in embarrassed circumstances, and had no property of his own, except his wife's income. Sir L. Shadwell, V. C., said, that he could not interfere with the right of the husband to receive his wife's income. They were living together, and he was maintaining her as well as he could.

Nor is the wife, it seems, entitled to a settlement out of property in which she has an equitable *life interest*, as against a person to whom her husband has assigned it for value previous to his insolvency or his desertion of her. Thus, in *Elliott v. Cordell*, 5 Madd. 149, the dividends of £9000 Three per Cents were given to a married woman for her life, with a bequest over. The hus-

band and wife joined in a sale of this life interest, and the *husband afterwards became a bankrupt. A bill being filed by the wife against the purchaser, insisting upon a provision, Sir John Leach, V. C., held, that she was not entitled to one. "I find," observed his Honor, "no authority for the equity claimed by the wife as against the *particular assignee*, in the case of an interest given to the wife for her life; and it does not follow, as a corollary or consequence, from any established doctrine of the Court. Where an *absolute* equitable interest is given to the wife, the Court will not permit the husband to possess it, without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest, subject to the same equity. But, where an equitable interest is given to the wife, *for her life only*, this Court does not permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this Court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and, if the husband becomes bankrupt, or takes the benefit of an insolvent debtors' act, this Court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by act of law upon the general assignee; for, when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a *particular assignee for a valuable consideration*, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If, however, I considered it to be useful, that the same rule should be applied to the particular assignee, as to the general assignee, which may be doubted, by declaring this rule in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this Court, but I should be making a new law, and I cannot venture to assume such a jurisdiction."

Again, in *Stanton v. Hall*, 2 Russ. & My. 175, lands were devised to trustees upon trust to pay the rents and profits to J. H. for life; but, if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of £100 during his life, and, after his decease, an annuity of £30 during her widowhood, and upon certain other trusts for the children of the [*372] *marriage. It was held, by Lord Brougham, on the authority of *Elliot v. Cordell*, that the annuity of £100 not being for the separate use of the wife, passed by the husband's assignment to a purchaser for value, and that, as against such purchaser, the wife had no equity for a settlement out of the annuity.

The case of *Vaughan v. Buck* has, indeed, been disapproved of by Lord Langdale, M. R., in *Wilkinson v. Charlesworth* and *Marsack v. Lyster*, (reported together, 10 Beav. 324.) In the latter case, the personal representa-

tive of a man who died, leaving his wife surviving him, claimed to be entitled to the income of her life estate in certain funds which accrued due in his lifetime; in the former case, a cestui que trust, under an assignment made by the husband, claimed to be entitled to the interest which accrued due in his lifetime upon the portion or portions to which he was entitled in right of his wife. It was argued, that if the husband maintained his wife, he acquired an independent right to her income accrued due in his lifetime, and that any arrears passed to his legal personal representative or assignee, in opposition to the right of the wife. His Lordship, however, said, that the sums of money claimed by the cestui que trust, under the husband's assignment, were choses in action of the wife, not possessed or reduced into possession by the husband when he died, and he was, therefore, of opinion, that the wife became absolutely entitled to them by survivorship. "I have read," observed his Lordship, "the papers with which I have been supplied, in the case of *Varughan v. Buck*, (which is reported in 13 Sim. 404,) and also a copy of the order which was made; and if the order was right, it does seem to be an authority for the proposition stated and relied on in the argument, that whilst the husband and wife are both living, the husband maintaining the wife is absolutely entitled to the whole of her income, in opposition to her claim to a settlement out of her life estate.

"As the case occurred during the lives of both husband and wife, it does not govern the point which I have now to consider; and I should have wished to abstain from expressing any opinion upon it; but considering how constant the practice of the Court has been, and how frequently the question may be raised, I feel it my duty to say, that, notwithstanding the case of *Vaughan v. Buck*, I must adhere to the rule which I consider to be established in such cases." See also *Bond v. Simmons*, 3 Atk. 20.

In the recent case, however, of *Tidd v. Lister*, 10 Hare, 140, it was held by Sir George Turner, V. C., that a married woman whose husband did not maintain her, was not entitled, as against a particular assignee of the husband [*373] to a settlement, or maintenance out of the *income of the real and personal estate to which she was entitled in equity for her life. After referring to *Wright v. Morley*, 11 Ves. 12, and to the cases of *Elliott v. Cordell*, and *Stanton v. Hall*, decisions against the right of the wife, his Honor observed, "It was strongly argued in this case, as it was in *Elliott v. Cordell*, that there could be no distinction between the cases in which the wife took a life interest only, and those in which she took an absolute interest, in which latter cases her right to a settlement was fully established against the assignee of her husband for valuable consideration; and that there could be no distinction between the particular assignee for value of the husband, and his general assignee in bankruptcy or insolvency: but there are distinctions between these cases which cannot be disregarded.

"In the cases where the wife takes an absolute interest, the provision is for her and her children. She cannot claim it for herself alone. In the cases where the wife takes a life interest, the provision is for her separate benefit, independently of the children, a distinction pointed out by Sir William Grant,

in *Wright v. Morley*. Again, in the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of her husband; in the case where she takes a life interest only, her right to a provision for herself arises from the non-fulfilment by him of his obligations, and is wholly dependent upon his acts and conduct. In the cases, too, where the wife takes an absolute interest, the purchaser takes subject to the well-known and settled equity; but where the wife takes for life only, the equity by which it is said the purchaser must be bound, may not exist at the time of his purchase, and depending as it does on the conduct of the husband, may never come into existence: and in this respect, also, there is a great distinction between the particular assignee for value, and the general assignee; for in the case of the general assignee, the very bankruptcy or insolvency on which his title is founded creates the right against him. Considering the question, without reference to the authorities, it must, I conceive, resolve itself into this point: Ought a court of equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that 'he who comes into equity must do equity,' the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded. In determining this point, the inconveniences which would ensue from the Court's acting upon the rule to which I have referred, must *not, I think, be thrown out [*374] of view. Purchasers would become involved in inquiries into the relation between husband and wife, the extent of their other property, and their other means of maintenance; and the life interest of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences, and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred. . . . Much reliance was placed on the observations of Lord Langdale in *Wilkinson v. Charlesworth*; but that was a question between the representative of the husband and the wife surviving; and Lord Langdale's observations seem to have been directed against what had fallen from the late Vice-Chancellor of England in *Vaughan v. Buck*, 13 Sim. 404, as having indicated a doubt whether the wife could in any case be entitled to a provision for maintenance out of her life interest. His Lordship could not, I think, have intended to say, that in every case, and as against every person, she would be so entitled; for in *Wright v. Morley*, 11 Ves. 17, to which he refers, Sir William Grant put the wife's right to a provision on the absence of the husband, and his having left her unprovided for, and directed an inquiry as to these points before he could make the order in favor of the wife. Indeed, I can find no case in which a wife has come to the Court for such a provision except under special circumstances; and certainly no case in which she has succeeded in

obtaining it against an assignee for value of her husband." This decision was, on appeal, affirmed by Lord Cranworth, C., who, with reference to the distinction in principle, supposed to rest between the mode of dealing with the purchaser of a wife's life interest, and the purchaser of her absolute interest, said, "that they are altogether satisfactory to my mind, I am not prepared to say; at the same time they are certainly not without weight, and considering the authorities are all one way, I think it would be very inexpedient now to attempt to disturb them." See 3 De G. Mac. & G. 857, 870.

With regard to *Elliott v. Cordell*, it is clear, since the decision of *Stiffe v. Everett*, 1 My. & Cr. 37, that the assignment of a life interest of a married woman in a fund not settled to her separate use, could not, in any event, be supported beyond the period of the joint lives of the husband and wife. *Stanton v. Hall*, it will be observed, differed from *Elliott v. Cordell*, inasmuch as the interest of the wife was determinable upon the death of her husband.

[*375] *A wife is entitled to a settlement out of property to which she becomes entitled before, as well as out of what she becomes entitled to after marriage: *Barrow v. Barrow*, 18 Beav. 529.

The Court, however, cannot order a settlement to be made of the reversionary personal property of a married woman. The reason for this is, that the right to the settlement, is an obligation which the Court fastens, not upon the property, but upon the right to receive it, and if the right attaches at all, it must attach with all its incidents, one of which is, that the wife waiving it, must waive it by her consent in Court, which she cannot do in the case of reversionary personal property; *Osborn v. Morgan*, 9 Hare, 432, 434; the question, as to whether a wife is entitled to a settlement can only be decided, when the reversionary property falls into possession; *Ib.*; and see *Taylor v. Austen*, 1 Drew. 459, 464; but see now 20 & 21 Vict. c. 57.

Rights of the children.—Whenever a woman insists upon her equity to a settlement, it will always be extended to her children, and a reference will, as in *Lady Elibank v. Montolieu*, be directed to ascertain what is a proper settlement to be made upon her and her children: *Johnson v. Johnson*, 1 J. & W. 472.

The equity to a settlement, however, is strictly personal to the wife. If, therefore, she dies before asserting her right, her children cannot insist upon a settlement. Thus, in *Scriven v. Tapley*, 2 Eden, 337, where a man after the death of his wife, leaving a daughter, filed a bill to obtain the payment of £300, to which his wife was entitled, Lord Northington, reversing the decision of Sir Thomas Clarke, M. R., held that the daughter had no equity to a settlement out of it. "The equity of compelling settlements," observed his Lordship, "first arose upon the husband's coming to this Court for assistance. It is *personal to the wife*, and, if carried further, would be attended with ill consequences to creditors. There is no case where the Court has refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children." Sir William Grant, it will be observed,

when *Murray v. Lord Elibank* came before him, cited the decision of Sir Thomas Sewell, M. R., in *Cockel v. Phipps*, 1 Dick. 391, in support of the decision of Sir Thomas Clarke, which he seems to have preferred to that of Lord Northington; however, Sir Thomas Plumer, M. R., in his elaborate judgment in *Lloyd v. Williams*, 1 Madd. 464, said that, on consulting the Register's book, he found the point never arose in *Cockel v. Phipps*, and that no case had touched upon the decision of Lord Northington in *Scriven v. Tapley*, and that from that time the decisions had been uniformly according *to that case, and that it would indeed have been surprising, if so correct a judge as Sir Thomas Sewell should, so soon after the deci- [*376] sion in *Scriven v. Tapley*, have acted in direct contradiction to it.

The wife, therefore, may, at any time before the settlement is actually completed, waive her right to it, and thus defeat the interests of her children. "That the children," observes Lord Cottenham, "have no equity of their own, that it is only the equity that they obtain through the consent of the mother, is sufficiently clear from the fact, that if the mother, having attained the age of twenty-one, comes into court, and consents that the property shall be paid over to the husband, the Court will permit it to be paid over, without reference to the interests of the children; but in no instance are the children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the mother, whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family:" *Hodgens v. Hodgens*, 11 Bligh, N. S. 104.

Sir Thomas Plumer, V. C., in *Lloyd v. Williams*, 1 Madd. 467, after an elaborate review of all the authorities, observes, that all the cases concur in showing that children have no right to a settlement "independent of contract or decree."

When the wife has entered into a contract, or has obtained a decree for a settlement, the interests of the children will not be defeated if she die without waiving it. Thus, as in *Lady Elibank v. Montolieu* and *Murray v. Lord Elibank*, where by a decree a reference is made to approve of a proper settlement, and the wife dies without waiving it, (which, as before observed, she can do,) her children may, by supplemental bill, claim the benefit of the decree, although no proposals for a settlement may have been made, and although they may not have been mentioned in the decree. See *Rowe v. Jackson*, Dick. 604; *Groves v. Perkins*, 6 Sim. 584; S. C., *Groves v. Clarke*, 1 Kee. 132. But if no mention is made of the children, the omission, if it has been long acquiesced in, will not be supplied. Thus, in *Johnson v. Johnson*, 1 J. & W. 479, where the interest of a fund in court was directed to be paid to the separate use of a married woman for life, with liberty for those entitled on her death to apply, Sir Thomas Plumer, M. R., said, that the Court ought to have referred it to the Master to approve of a proper settlement, instead of

making that order; but that, as it was made thirty-four years ago, it could not then be altered.

[*377] *In *Lloyd v. Williams*, 1 Madd. 450, the wife of a bankrupt being entitled to a legacy, *she claimed her right to a settlement out of it*, and an agreement was thereupon entered into between the assignees and the executor, whereby, in consideration of a sum to be paid to the assignees, a settlement was to be made upon the wife and her children.. The bankrupt obtained his certificate in the lifetime of his wife, who died before any settlement was made in pursuance of the agreement, leaving an only daughter. Sir Thomas Plumer, V. C., held, that the death of the mother did not disappoint the claim of the child.

Even after a bill has been filed relative to property out of which it is competent for a married woman to claim a settlement, if she die before doing so, her children will not be entitled to claim a settlement. The contrary, indeed, was decided in *Steinmetz v. Halthin*, 1 G. & J. 65; there a bill had been filed by trustees for the administration of the trust property, and a married woman, entitled to part of it, died *before decree*, and without having put in her answer; yet Sir John Leach, V. C., held, that, upon the bill being filed, the equity of the wife attached upon the property, and that her death pending the suit, without having waived her equity, though before answer, gave to the children an immediate title to the provision that the wife would have acquired if living. However, in *De La Garde v. Lempriere*, 6 Beav. 344, where a bill was filed for the administration of an estate, out of which a married woman, who was made a defendant, was entitled to a legacy, a decree was made for taking the accounts and for making certain inquiries. The married woman died before the Master's report was made, and without having claimed any right to a settlement. Lord Langdale, M. R., held, that her children had no equity to a settlement. "In this case," observed his Lordship, "the wife filed no bill claiming a settlement, and she died before any order for a settlement was made. . . . If the case of *Steinmetz v. Halthin* had been followed by others, I should have considered myself bound by it; but standing alone, and being, as it appears to me, contrary to the previously existing rules on this subject, I do not consider myself to be at liberty to act upon it, without considering the principle on which it is founded.

"In all cases, the equity of the wife is personal, and it arises upon the vesting of the legacy in her. It may be defeated by a voluntary payment of the executors to her husband, who has a legal right to receive it, and give a discharge for it. If the payment is to be made through the medium of the Court, her equity will be enforced if she desires it, but not [*378] otherwise; she may abandon it, in which case her *children can claim nothing, and, if she claims it for herself, the Court requires the benefit to be extended to her children; her equity, and the equity of her children, are treated as one equity, to be enforced or not at her option. If the equity were to be considered as attached to the property on the filing of the bill, it must, I apprehend, be considered for the benefit of her children at the same time; but, if so, she could not afterwards waive it for herself, because

her equity and theirs are one ; and, as it is admitted that she can waive it after the institution of the suit, it seems to me to follow, that it is not an equity, which upon the filing of the bill, attaches upon the property for the benefit of the children.

“It is true that, after the filing of the bill, the discretion which the trustee or executor had to pay the wife’s legacy to the husband is greatly altered. The filing of the bill has, it has been said, made the Court the trustee, and if the wife be living, the Court will not pay the wife’s legacy to the husband if she desires a settlement, or unless she waives it ; but, where death has made any option on her part impossible, when nothing has occurred from which it can be concluded that she has made an option, there seems to be no reason why the legal right of the husband should not prevail ; and I am, therefore, of opinion, notwithstanding the case of *Steinmetz v. Halthin*, that in this case the wife’s equity did not attach to the property for the benefit of the children, on the institution of the suit, or before her death, but that upon her death, *before decree, and before any arrangement for a settlement*, her legal personal representative became entitled to the legacy.”

In *Baker v. Bayldon*, 8 Hare, 210, a married woman, who as one of the next of kin of an intestate was together with her husband made a defendant in an administration suit, died before putting in her answer and therefore without any opportunity of claiming her equity to a settlement, leaving an infant child, it was held by Sir James Wigram, V. C., that the child was not entitled to a settlement. “The equity of the wife,” said his Honor, “is not an actual interest, but is a mere right given to her if she thinks fit to claim it. It is an equity which does not arise until the husband or some person claiming under him applies for the fund ; and the Court then inquires of the wife whether she is willing to forego the equity which the Court gives her. This is clearly the view of the right of the wife, and the consequence of that right to the children, which was entertained by Sir Thomas Plumer upon his examination of the cases in *Lloyd v. Williams*, (1 Madd. 450,) and the decision of Lord Langdale, (*De La Garde v. Lempriere*, 6 Beav. 344,) so far as the case before him goes, affirms the same principle.”

*In *Lloyd v. Mason*, 5 Hare, 149, a married woman, entitled to a legacy appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser, and for the wife, agreed to refer the claim of the wife to their counsel ; and the counsel determined that she was entitled to a settlement of a moiety, subject to the costs. Before any further steps were taken the wife died, leaving children. It was held, by Sir James Wigram, V. C., that the husband, and those claiming under him, were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children ; and that, upon the death of the wife, the children were entitled to the portion which would have been settled. “If,” said his Honor, “in order to decide this case, an obligation had been imposed upon me, of deciding between

the conflicting opinions of Sir John Leach and Lord Langdale, I should certainly have taken a great deal of time to consider the matter. But I may, I think, decide the case without expressing an opinion upon that point; and the only observation which it will be necessary to make is this: It appears that the question, whether the children can, after the death of their mother, insist upon her equity to a settlement, depends not upon the question, whether the mother was bound, but upon the question, whether the father was bound. It is clear, that an order, referring it to the Master to approve of a settlement, binds the husband, though it does not necessarily bind the wife. There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled. The question, whether the husband is, or is not bound, must be governed by the ordinary principles of the Court."

In accordance with this opinion of his Honor, it is clearly settled, that, although the husband, in the event of his wife's death, is bound by a contract or decree for a settlement, yet the wife can, at any time before it is actually made, waive her equity to a settlement. The opinion of Sir John Leach, indeed, was at one time to the contrary. Thus, in *Fenner v. Taylor*, 1 Sim. 169, where the husband of a woman entitled to a fund in Court signed a written agreement that he would settle half the wife's fortune upon her, Sir John Leach, V. C., held, that the wife could not waive her right to a settlement, so [*380] as to defeat her children. "Where the *agreement of the husband," observed his Honor, "is carried into effect by the execution of a proper deed, it is not argued that the wife can then waive it; and, upon principle, and by analogy, it should seem, that in equity there is no distinction between the agreement and the deed. Upon the whole, therefore, I come to the conclusion that this is an agreement which enures for the benefit of the children, and would be executed in this Court upon a bill filed by them, and cannot, therefore, be waived by the wife." Sir John Leach, however, was not aware that Sir William Grant, M. R., had, upon that identical agreement, but with reference to another portion of the fund, held, that the wife might, notwithstanding the agreement, waive all right of herself and her children to a settlement under it; and Lord Brougham, approving of the decision of Sir William Grant, reversed that of Sir John Leach, 2 Russ. & My. 190: and Sir John Leach, when the wife waived her right to another portion of the same fund, allowed it to be paid to her husband, but he said that the reasons upon which he had formerly come to a different opinion, (and to which he still felt disposed to adhere,) appeared to him to be of considerable weight: *Fenner v. Taylor*, 2 Russ. & My. 195.

Upon the same principle in *Baldwin v. Baldwin*, 5 De. G. & Sm. 319, the wife of a lunatic being entitled to a share of the residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee were authorized to assent to a settlement of one-half of the fund; and by an order made in the cause it was referred to the Master to approve of a settlement.

The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the whole fund. It was held by Sir James Parker, V. C., that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the Court ordered the whole amount of the fund to be paid to the representatives of the wife.

But if the wife, upon the bankruptcy of her husband, established her equity to a settlement, as against the assignees, she will not be allowed afterwards to waive it in favor of her husband, so as to defeat the rights of her children, although she might do so in favor of the assignees: *Barker v. Lea*, 6 Madd. 330; *Whittem v. Sawyer*, 1 Beav. 593.

As to the amount of the wife's property to be settled.—When the husband is solvent, the amount to *be settled upon the wife and children depends generally upon arrangements entered into between the husband [*381] and wife. And as we shall hereafter state more fully if he declines to agree to a settlement, the Court will, in general, if he has been guilty of no misconduct, allow him to receive the income of her property, (post, p. 388.) The amount however of the wife's property which is to be settled, is most frequently discussed in Court when he has become either bankrupt or insolvent.

The rule in general is, that one-half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees: *Jewson v. Moulson*, 2 Atk. 423; *Worrall v. Marlar*, 1 Cox, 153; 2 Dick. 647; *Brown v. Clark*, 3 Ves. 166; *Bagshaw v. Winter*, 5 De G. & Sm. 466; and see *Dunkley v. Dunkley*, 2 De G. Mac. & G. 396. But this is a matter in the discretion of the Court, which, taking into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been made, may settle a larger proportion of the fund. See *Green v. Otte*, 1 S. & S. 250; *Napier v. Napier*, 1 D. & W. 407; *Aubrey v. Brown*, 4 W. R. 425; and in *Coster v. Coster*, 9 Sim. 597, where, a husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in Court, arising from property bequeathed to the wife, was ordered by Sir L. Shadwell, V. C., to be settled on her and her issue generally, and the remaining fourth to be paid to the husband. See also *Ex parte Pugh*, 1 Drew. 202; *Vaughan v. Buck*, 1 Sim. N. S. 284.

It was at one time laid down by a very careful judge that the Court would not settle the whole of the property upon the wife. This was the case of *Beresford v. Hobson*, 1 Madd. 362, there a bill was filed by the assignees of the husband, who was a bankrupt, to recover money to which the bankrupt was entitled in right of his wife. The Master, upon a reference, approved of a settlement of the whole of the property on the wife and children. Upon exceptions being taken to the Master's report, it was argued, in support of the settlement, that the bankrupt had committed felony by not surrendering, and that he had abandoned his wife, and lived in another country. Sir Thomas Plumer, V. C., after an elaborate view of the authorities, allowed the exceptions, observing,

that it was said that the husband had committed a felony in not surrendering, and that the wife was separated from her husband, and that grounds of compassion were urged; but the felony was subsequent to the commission, and the separation from the husband was not constrained, and was long posterior to the bankruptcy, when all the husband's rights had vested in his assignees; and, [*382] as to compassion, *it must be remembered that it was due as much to the creditors and their families as to the bankrupt's wife and her children. That in no case had the Court given the whole to the wife. That the question, in most cases, had been, how much the wife should have; and in determining that, the Court had exercised a discretion, and had not tied itself down to any precise rule, but had never given the whole.

Notwithstanding the remarks of Sir Thomas Plumer, in *Beresford v. Hobson*, it is clear that the whole fund will under special circumstances be settled. Thus the whole of the legacy seems to have been settled upon the wife, as against the assignees of her husband, who was a bankrupt, in *Jacobs v. Amyatt*, 1 Madd. 376, which was cited in *Beresford v. Hobson*. Again, in *Brett v. Greenwell*, 3 Y. & C., Ex. Ca. 230, where the husband had taken the benefit of the Insolvent Debtors' Act, Alderson, B., said that he did not understand *Beresford v. Hobson*, and held the wife and her children entitled to the whole of the fund in Court, observing, that the situation of an insolvent was very different from that of a bankrupt; that the wife of an insolvent might be in the workhouse with her children, and yet if the insolvent afterwards acquires property, neither the wife nor the children will be benefited by it, but the whole goes to the creditors; but a bankrupt, on the other hand, after he has obtained his certificate, is a free man. However, in *Napier v. Napier*, 1 D. & W. 407, where there was a fund in Court, amounting to £1000, the property of a married woman, whose husband had been discharged as an insolvent, Lord Chancellor Sugden ordered £600 to be applied for the benefit of the wife and her children, and £400 to be paid to the assignee, for the benefit of the creditors; and his Lordship observed, "that, in his opinion, *Brett v. Greenwell* could not be supported; for, however true it was, as stated in that case, that there did exist a difference as to the operation of bankruptcy and insolvency upon after-acquired property, upon which difference the decision there was rested, yet there was no distinction as to the rights of assignees in the property of the bankrupt or insolvent at the time of the happening of the bankruptcy or insolvency, upon which rights the practice in bankruptcy alone could have been founded. The assignee of an insolvent husband must take the same interest in the wife's choses in action that the assignee of a bankrupt husband did."

Lord Chancellor Sugden, however, in this case, did not mean to lay it down as law that in no case could the Court in its discretion settle the whole fund upon the wife, but he seems to have thought either that the discretion was not [*383] *properly exercised in *Brett v. Greenwell*, or at any rate, that the distinction as to the rights of assignees in bankruptcy and insolvency laid down by the learned Baron in that case was not correct, and ought not to

influence the mind of the Court in the determining what the amount of the settlement should be.

It seems to be clear at the present day, that when the husband has become bankrupt or insolvent, and has already received a considerable fortune from his wife, the whole fund will be settled. See *Gardner v. Marshall*, 14 Sim. 575, where the husband had large advances made to him by his wife's father, and had the benefit of a provision made for his wife by her father's will, and afterwards became bankrupt, Sir L. Shadwell, V. C., held that the wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life for her separate use, without power of anticipation. "The question," observed his Honor, "is, in effect, what settlement ought to be made on the wife *out of the whole property which came by her?* and the sums that her father advanced to her husband were, in substance, though not in form, part of her fortune."

So, also, the whole may be settled when the husband is insolvent and has made no settlement on his wife, (*Francis v. Brooking*, 19 Beav. 347; *Scott v. Spashett*, 3 Mac. & G. 599,) even as against a purchaser for value from the assignees of the husband, (*Ib.*) or as against his own assignee for value, *Marshall v. Fowler*, 16 Beav. 249.

There will also be a stronger disposition to settle the whole fund upon the wife when it is small and barely sufficient for a provision for the wife and children, (*In re Kincaid's Trusts*, 16 Jur. 106; 1 Drew. 326,) or where there has been misconduct on the part of the husband, as where he has deserted his wife without leaving her the means of support. *Dunkley v. Dunkley*, 2 De Gex, Mac. & G. 390; *In re Cutler*, 14 Beav. 220; *Gent v. Harris*, 10 Hare, 383; *Layton v. Layton*, 1 Sm. & Giff. 179; *Re Disney*, 2 Jur. N. S. 206. But when negotiations had been carried on between the parties for several years, which had involved the assignee in considerable expenses, three-fourths only of the fund instead of the whole were settled. *Walker v. Drury*, 17 Beav. 482.

As to the mode of settlement.—With regard to the nature of the settlement which the Court will direct to be made, it seems to be clear, that in the absence of special circumstances, the income of a personal fund will be given to the wife to her separate use for life, and the fund itself after her death to her children—generally, "to such children as being^s sons, should attain [*384] twenty-one, or being daughters, should attain that age or marry." *Gent v. Harris*, 10 Hare, 383, 384; *Francis v. Brooking*, 19 Beav. 349. And if there should be no issue, and the wife survives the husband, to her absolutely; but if the husband should survive the wife, then in the absence of special circumstances the Court will not defeat the legal right of the husband but give the fund to him, (*Carter v. Taggart*, 1 De G. Mac. & G. 286, 289; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *Watson v. Marshall*, 17 Beav. 363,) or his particular assignee for value, (*Carter v. Taggart*, 1 De G. Mac. & G. 286; and see *form of Order*, 5 De G. & Sm. 55,) or general assignees, (*Ex parte Pugh*, 1 Drew. 202; *Gent v. Harris*, 10 Hare, 383, 384,) absolutely.

The fact of the husband having assigned his interest, or having become

bankrupt or insolvent, or of the wife's relations being in humble circumstances, will not be considered as sufficient reasons for deviating from the general rule, so as in default of issue to give the wife a general power of appointment, or in default of appointment to settle the property to the exclusion of the husband or his general or particular assignees, upon the next of kin of the wife. *Carter v. Taggart*, 1 De G. Mac. & G. 286, overruling the decision of Sir James Parker, V. C., 5 De G. & Sm. 49; *Bagshaw v. Winter*, Ib. 466.

In order to avoid the expense of a settlement where the fund is small, it will be ordered to be brought into court, (*Bagshaw v. Winter*, 5 De G. & Sm. 468,) if not there already, and the Court will direct the dividends to be paid to the wife for her separate use for life, and either declare the trusts after her death, (Ib.; and see *Watson v. Marshall*, 17 Beav. 363; and abstract of order to p. 305; *Walker v. Drury*, 17 Beav. 484; *Wright v. King*, 18 Beav. 461;) or give liberty to the persons entitled at her death to apply. *In re Cutler*, 14 Beav. 220, 222.

Waiver of settlement.—If a woman wish to waive her equity to a settlement, her consent to her husband having her property must be formally taken upon her examination in court, or under a commission issuing from the Court, (Seton on Decrees, 322, 2nd edit.;) or from a competent court in a foreign state. See *Campbell v. French*, 3 Ves. 323.

But in general, if the wife is abroad, her consent must be taken by commission: *Tasburgh's case*, 1 V. & B. 507. However, in the case of *Minet v. Hyde*, 2 Bro. C. C. 663, it was ordered that the married woman should appear before some of the plaintiffs and a magistrate of Breda, to be privately examined in the French or German language, as to her consent, and the examination attested by notaries public, and translated *on oath. And see *Parsons v. Dunne*, Belt's Suppl. to Ves. 276.

An infant feme covert cannot give her consent. See *Stubbs v. Sargon*, 2 Beav. 596; *Abraham v. Newcombe*, 12 Sim. 566, overruling *Gullin v. Gullin*, 7 Sim. 236. Nor will the consent be taken until the amount of the fund is ascertained, (*Edmunds v. Townshend*, 1 Anst. 93; *Jernegan v. Baxter*, 6 Madd. 32; *Sperling v. Rochfort*, 8 Ves. 180;) except, perhaps, where it is only liable to diminution by the deduction of unascertained costs, the taxation of which has been directed: *Packer v. Packer*, 1 Coll. 92.

Where a married woman consented to her husband receiving the whole fund, being ignorant that the effect of his previous insolvency (of which the Court was not informed) would be to give it to his assignees, the Court ordered the whole fund to be settled. A consent given under these circumstances is not such as would have been taken, if the Court had known the facts; it would have inquired and fully explained the effect of the consent to the married woman. It is not a formal but a substantial objection; for it is the duty of the Court to explain to a married woman that she gets and loses by her consent. *Watson v. Marshall*, 17 Beav. 363.

Neither the husband, nor his solicitor, nor any person connected with him, ought to be present at the examination. *In re Bendyshe*, 3 Jur. N. S. 727.

Where the wife waives her equity to a settlement, and consents to her hus-

band having her property, an affidavit must be made by the husband and wife, either that there was no settlement upon their marriage; or if there was a settlement, it should be produced, and an *affidavit* made by the husband and wife that there was no other settlement, and that the settlement itself does not affect the property which the wife consents to her husband having. See *Britten v. Britten*, 9 Beav. 143, and note, and the forms of affidavits there given.

Where the wife is domiciled in a foreign state, upon proof that by the laws of such state her husband would be entitled to the whole of her property, without making any provision for her, the consent of the wife will not be required by the Court, and the fund will be ordered to be paid to the husband, without his being required to make any settlement upon her, (*Sawer v. Shute*, 1 Anst. 63; *Campbell v. French*, 3 Ves. 323; *Dues v. Smith*, Jac. 544; *Anstruther v. Adair*, 2 My. & K. 513; *In re Molyneux Minors*, 5 Ir. Ch. Rep. 346; *M^cCormick v. Garnett*, 5 De G. Mac. & G. 278;) or if the property of the wife is money to arise from the sale of land, the husband (not being an alien) electing to take it in an unconverted state may have a conveyance of it *to himself in fee: see *Hitchcock v. Clendinen*, 12 Beav. [*386] 534, where the husband and wife were domiciled in Scotland.

The proof of the law in foreign states in such cases being one of fact, it will not be decided by authority, but by the evidence in each case: *M^cCormick v. Garnett*, 5 De G. Mac. & G. 278.

Where it was sought to have funds belonging to a domiciled Scotch feme covert paid out of court, and a Scotch settlement was in existence, the Court required the testimony of a Scotch Advocate, to show that it did not affect the fund, not being satisfied with the affidavit of a gentleman describing himself as a "solicitor practising in the Supreme Courts of Scotland, Edinburgh." *In re Todd*, 19 Beav. 582.

The consent of the wife is not requisite, where the fund is under £200, but before payment it must be shown that it is not in settlement: *Elworthy v. Wickstead*, 1 J. & W. 69; *Hedges v. Clarke*, 1 De Gex & S. 354. It was at one time thought that the wife was not entitled to a settlement, where the fund was under £200, (*Foden v. Finney*, 4 Russ. 128;) it has, however, been held by Sir John Romilly, M. R., that the wife, although her consent may not be requisite before payment of a sum under that amount to her husband, is as much entitled to a settlement out of a small as out of a large sum. See *Re Cutler*, 14 Beav. 220; which case has been followed by Sir R. T. Kindersley, V. C.; see *In re Kincaid*, 1 Drew. 326.

A female ward of the Court, married without its authority, or in contempt of it, will not be allowed to waive her right to a settlement out of her own property, (*Stackpole v. Beaumont*, 3 Ves. 89;) and the settlement will in general be much less in favor of the husband than in ordinary cases, as the Court will attend principally to the interest of the wife, and her children by that or any subsequent marriage, (*Stevens v. Savage*, 1 Ves. jun. 154; *Chassaing v. Parsonage*, 5 Ves. 15; *Millet v. Rowse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 74; *Wells v. Price*, 5 Ves. 398; *Winch v. James*, 4 Ves.

386; *Priestly v. Lamb*, 6 Ves. 421; *Halsey v. Halsey*, 9 Ves. 471; *Pearce v. Crutchfield*, 16 Ves. 48; *In re Healey*, 1 C. & L. 393; *In re Anne Walker*, L. & G. t. Sugd. 325; *Hodgens v. Hodgens*, 11 Bligh, N. S. 62; 4 C. & F. 323; *Birkett v. Hibbert*, 3 My. & K. 227;) especially when a man of no fortune marries a ward without the leave of the Court, with the sole object of getting possession of her property. See *Like v. Beresford*, 3 Ves. 506; *Ball v. Coutts*, 1 V. & B. 303.

In a recent case, however, a ward of the Court, who married without its leave, though with the consent of her guardian, was allowed, on coming of [*387] age, to consent to her husband having her property without his making a settlement on her: *Bennett v. Biddles*, 10 Jur. 534.

A married woman cannot waive her right to take her reversionary personal property by survivorship, (*Osborn v. Morgan*, 9 Hare, 432, 434;) whether it might possibly vest in possession during the coverture, or could only vest after the husband's death: *Box v. Box*, 2 C. & L. 605; *Box v. Jackson*, 1 Dru. 482; where all the authorities on the subject are reviewed: but see now 20 & 21 Vict. c. 57.

What will defeat or bar the wife's equity to a settlement.—The receipt by the husband or his assignees of the rents and profits, or a transfer of the fund, will defeat the wife's right to a settlement; and, as laid down by Lord Eldon, in the principal case, "previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband, but not if the bill has been filed; and if the husband, or those claiming under him, can obtain the property of the wife by an action at law, equity will not by injunction prevent them from doing so." (See, also, *Milner v. Colmer*, 2 P. Wms. 641; *Jewson v. Moulson*, 2 Atk. 420; *Allday v. Fletcher*, 3 Jur. N. S. 422; 26 L. J. N. S. (Ch.) 519.) But after a bill has been filed, trustees could not safely make any payments to the husband: *Maucaulay v. Philips*, 4 Ves. 18; *De la Garde v. Lempriere*, 6 Beav. 344, 347.

But injunctions, in many instances, have been granted to restrain the husband from proceeding in the Ecclesiastical Court for a legacy due to his wife, until he had agreed to make a reasonable provision for her: *Jewson v. Moulson*, 2 Atk. 420; *Gardner v. Walker*, 1 Stra. 503; *Elibank v. Montolieu*, 10 Ves. 90.

Where a married woman was indebted previous to her marriage, and the debt was proved under the husband's bankruptcy, the debt being greater than the fund, it was held that she was not entitled to a settlement, but that the whole fund should be paid to the assignees: *Bonner v. Bonner*, 17 Beav. 86.

The wife's equity to a settlement will be barred by an adequate settlement having been made upon her, but not by an inadequate settlement, unless it be by an express stipulation before marriage. (*Salvey v. Salvey*, Amb. 692; *Garforth v. Bradley*, 2 Ves. 675.) And in a recent case, where an adequate settlement had been made upon the wife, the husband was held to be entitled to the whole fund, although he was living apart from his wife, they having

separated by mutual consent and agreement, and no blame being imputed to one party more than the other. *In re Erskine's Trusts*, 1 K. & J. 302.

If the wife be living in adultery, *apart from her husband, she cannot, except under very peculiar circumstances, (*In re Lewin's Trust*, [388] 20 Beav. 378,) insist upon her equity to a settlement; (*Carr v. Eastbrooke*, 4 Ves. 146;) but even then it seems the husband will not be allowed to receive the whole of her property, while he does not maintain her. See *Ball v. Montgomery*, 2 Ves. jun. 191, in which case Lord Loughborough ordered the future dividends of the fund to be paid into court, subject to further order; observing that the wife's delinquency was a good ground for not paying it to her, but was not a ground for letting the husband receive the whole of the property, which being hers originally, was intended to be his, partly to support her.

Where both husband and wife are living in adultery, it has been held that the wife may claim a settlement: *Greedy v. Lavender*, 13 Beav. 62.

A female ward of Court, married without its consent, will not be barred from her claim to a settlement, although she should be living in adultery: *Ball v. Coutts*, 1 V. & B. 302, 304; *In re Anne Walker*, L. & G. t. Sugd. 299.

Wife, when allowed maintenance by Court out of her equitable property.—If the husband refuse to make a settlement upon his wife, the Court will not go so far as to do anything in diminution of his legal rights, so as to take away the produce of his wife's property from him, or prevent his receiving the interest, so long as he is willing to live with and to maintain her, and there is no reason for their being apart. The Court, however, will retain the capital, so as to give the wife a chance of taking it by surviving her husband: *Sleech v. Thorrington*, 2 Ves. 562. And see *Oxenden v. Oxenden*, 2 Ves. 493; *Williams v. Callow*, 2 Vern. 751.

This course, it seems, will be adopted where a husband and wife are entitled to a fund as tenants by entireties: see *Atcheson v. Atcheson*, 11 Beav. 485, where a husband and wife being entitled to a legacy as tenants by entireties, the wife claimed a settlement out of the *whole* fund, the husband claimed that a moiety ought to be paid to him, Lord Langdale, M. R., ordered the legacy to be carried over to the joint account of the husband and wife; with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply. "The joint interest," said his Lordship, "given to husband and wife in this way, or the joint tenancy between them, if it can be so called, is so modified by the unity of the persons in law,—the consequent rights of the husband and wife by entireties, and the contingent right of the survivor to the whole, if not previously disposed of by the husband,—that it does not *appear to me to be subject to the ordinary incidents of joint-tenancy. And, it not being ascertainable [389] what belongs to the wife separately, or what the husband is entitled to in her right, I am unable to decide out of what portion of the legacy a settlement can be made upon her, according to the rules of this Court." And see *Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547. But it seems that, if a

fund, to which the husband and wife are entitled as tenants by entireties, as in the case of the legacy in *Atcheson v. Atcheson*, be not brought under the consideration of the Court, payment to the husband, in the lifetime of the wife, would be a good payment. Per Lord Langdale, M. R., in *Atcheson v. Atcheson*, 11 Beav. 491: and see *Grute v. Locroft*, Cro. Eliz. 287.

Where the husband was a lunatic, not found so by inquisition, and the fund was small, the dividends were ordered to be paid to the wife: *Stead v. Calley*, 2 My. & K. 52.

In *Bond v. Simmonds*, 3 Atk. 21, Lord Hardwicke went so far as to say, that, where a husband has received a good part of the wife's portion, and only a small part remains, and the husband is so perverse that he will not make a competent settlement on the wife, the Court will not only stop the payment of the residue of her fortune to the husband, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance.

Where, however, the husband deserts the wife, and leaves her unprovided for, the Court will direct the payment of the interest of the wife's property to her, until the husband returns and maintains her as he ought to do: *Watkins v. Watkins*, 2 Atk. 96; *Sleech v. Thorrrington*, 2 Ves. 562; *Peters v. Grote*, 7 Sim. 238; *Rishton v. Cobb*, 9 Sim. 620.

It has been before shown, that, according to the decisions of the Court, although a married woman, as against the assignees of her husband in bankruptcy or insolvency, is entitled to have a settlement or maintenance out of her equitable property, in which she has *only a life interest*, (*Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clark*, 3 Ves. 166; *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Sturgis v. Champneys*, 5 My. & Cr. 97; *Vaughan v. Buck*, 13 Sim. 404; *Koeber v. Sturgis*, 22 Beav. 588,) she, nevertheless, cannot claim either, as against the legal right of her husband, not being bankrupt or insolvent, although he may be in difficulties, for the husband is entitled to the wife's income as long as he maintains her to the best of his ability, and they are living together: *Vaughan v. Buck*, 13 Sim. 404. Nor can she claim a settlement or maintenance *out of the income of her equitable property, as against the particular assignee for value of her husband, although subsequently to the assignment he may become bankrupt or insolvent, or desert and leave her utterly destitute; (*Tidd v. Lister*, 3 De Gex, Mac. & G. 857; ante, p. 370;) but if the husband deserts the wife, leaving her unprovided for, the Court will allow her maintenance out of her life interest in equitable property, not specifically assigned by the husband for value; *Wright v. Marley*, 11 Ves. 12, 23; *Gilchrist v. Cator*, 1 De Gex & Sm. 188; *Allerton v. Knowel*, cited 4 Ves. 799. And where a person made advances to a married woman, deserted by her husband, on the credit of a fund in Court—her property, for her maintenance, exceeding the amount of the income, he was reimbursed out of the capital: *Guy v. Pearkes*, 18 Ves. 195.

And the Court will not allow the right of a wife for maintenance to be defeated by her husband making a fraudulent conveyance of her property to trustees for payment of his debts: *Colmer v. Colmer*, Mos. 113, 118.

In order to favor as far as possible all efforts towards reconciliation on the husband's part, notwithstanding a decree has been made allowing the wife a separate maintenance, upon his consenting to cohabit with her, and promising to use her kindly, the Court has refused to continue the separate maintenance: per Lord Hardwicke, in *Head v. Head*, 3 Atk. 296; and see *Gilchrist v. Cator*, 1 De G. & Sm. 188.

A woman cannot represent herself as deserted when her husband leaves her in the course of his duty, and she refuses to accompany him. See *Bullock v. Menzies*, 4 Ves. 798, in which case the husband was an officer in a marching regiment.

However, when the cruelty or improper conduct of the husband renders her leaving him necessary or justifiable, and there is no impropriety on her part, the Court will hold her entitled to maintenance or a settlement. See *Oxenden v. Oxenden*, 2 Vern. 493; *Williams v. Callow*, 2 Vern. 752; *Atherton v. Nowell*, 1 Cox, 229; *Eedes v. Eedes*, 11 Sim. 569. And where the husband has conducted himself so that the wife cannot live with him, as, for instance, where she has obtained against him a divorce upon the ground of cruelty and adultery, especially if it appears that he married her from merely interested motives, and is not maintaining her, the Court may give to the wife the income of the whole of her property, although the husband may have received nothing from her on the marriage: *Barrow v. Barrow*, 5 De G. Mac. & G. 782.

But the Court will not give the wife maintenance out of *property [*391] given to her for life, if she has already an adequate provision for her separate use. Thus, in *Aguilar v. Aguilar*, 5 Madd. 414, although the husband had taken the benefit of the Insolvent Debtors' Act, Sir John Leach, V. C., refused the wife a further maintenance, upon the ground that she "had an ample separate provision for maintenance secured to her by settlement, as well as a further separate provision under the will of a relation." "The principle," said his Honor, "upon which this Court gave such a provision out of property of this description against the husband when he deserted his wife, and against his general assignee in case of his bankruptcy or insolvency, was, that the law, when it gave the wife's property to the husband, imposed upon him the obligation of maintaining her, and if he failed in that obligation, either by the desertion of his wife, or by his inability to assist in her support, this Court would fasten that obligation on the property itself; this principle did not apply where the wife had secured to her a competent separate maintenance."

Where the wife had eloped and lives in adultery, she will not be allowed maintenance out of the income of property to which she is entitled for life: see *Ball v. Montgomery*, 2 Ves. jun. 191, where Lord Loughborough said, "that it would be enormous to give it to enable her to keep the gallant, instead of his keeping her;" but in the same case his Lordship refused to let the husband have the income, observing, "the delinquency of the wife is a good ground for not paying it to her, but is not a ground for me to let him receive the whole of this property, which, being hers originally, was intended

to be his *partly to support her*. I cannot let her have it, nor the husband, as then she would be left unprovided for. See the consequence of it: from her past and still subsisting misconduct, I must continue her in a state of adultery or reduce her to beggary. I cannot suppose he is to take her back. *Alexander v. M'Culloch* (cited 2 Ves. jun. 192) is, as far as I have heard it, a very good rule go by. The situation of the case will probably produce some agreement for her future support."

Where, however, the husband is by express contract entitled to an interest during their joint lives in the property of his wife, and he is obliged to separate himself from her in consequence of her misconduct, his rights will not be therefore affected. Thus, in *Duncan v. Campbell*, 12 Sim. 616, £4000 was by deed vested in trustees, to pay the interest thereof to the husband and wife during their joint lives, and to stand possessed of the principal for the survivor of them. The husband afterwards separated from his wife in consequence of her having *committed adultery. It was held by Sir L. Shadwell, V. C., that under the words of the deed the husband was entitled to receive the whole of the income, and that he could not be deprived of the benefit which he was entitled to under the deed, because his wife had so misconducted herself that he was justified in living separate from her."

How far settlements made in consideration of the wife's equity to a settlement will be binding as against creditors.—It is clear that where the Court directs a settlement to be made upon the wife, "the Court will support it as a good settlement, for valuable consideration." See *Wheeler v. Caryl*, Amb. 121; *Simson v. Jones*, 2 Russ. & My. 365. The Court, moreover, has gone further; if after marriage, the wife being entitled to such a portion which the husband cannot touch without the aid of the Court, and the trustees will not pay it without the husband making a settlement; if the husband does not agree to it, and do that which the Court would decree, it is a good settlement as against his creditors. Per Lord Hardwicke, C., in *Wheeler v. Caryl*, Amb. 121, 122. So, likewise, in *Moor v. Rycault*, Prec. Ch. 22, the trustees in whom the portion of a married woman was vested refused to part with it unless the husband would give security that it should be settled for the benefit of his wife, and it was accordingly agreed that it should be laid out in land to be settled upon the husband and wife, and the heirs of their bodies. A bill was afterwards filed by a creditor of the husband to set aside the settlement, upon the ground that it was voluntary, as being made after marriage, and in fraud of creditors. "But the Court would do nothing in it, for that if the husband had exhibited a bill against the trustees for the portion, the Court would not have decreed it to him, without making some such settlement." See also *Middlecome v. Marlow*, 2 Atk. 518; *In re Wray's Trusts*, 16 Jur. 1126.

But if the husband has once reduced into possession the equitable choses in action of his wife, any subsequent settlement of them would not be valid as against his creditors. See *Ryland v. Smith*, 1 My. & C. 53; there a married woman being entitled under a will to stock and to cash, forming part of a residue, her husband wrote to one of the executors, requesting that the stock

should be transferred into the names of certain trustees for the wife's separate use, and that the cash should be paid to himself. These requests were complied with. The husband employed part of the *cash in increasing the amount of the stock*. He afterwards became bankrupt and died. It was held by Sir C. C. Pepys, M. R., that the stock transferred *by the executors was [*393] not reduced into possession by the husband, and therefore belonged to the wife by survivorship; but that the assignees under the bankruptcy were entitled to the increase made by the husband. "It is said," observed his Honor, "on behalf of the assignees, that the transfers having been made with the assent and direction of the husband, amount in law to a reduction into possession by him. If this were so generally, it would be impossible for persons holding money in trust for a married woman to make a settlement of it upon her with the consent of the husband, without coming to a court of equity for that purpose.

"The question of right cannot depend upon whether there was a more or less ready assent by the husband, or upon any speculation as to whether the executors would or would not have paid the whole to him if he had demanded it. This would be impossible to ascertain, and it would be too dangerous to make the rights of parties depend upon what they might afterwards say upon that subject. The directing or consenting to an investment consistent with the wife's equities, cannot be considered as an act destroying such equities by being a reduction into possession; but it was argued to that extent, and that the wife therefore had lost the benefit even of a settlement out of those funds; and it was necessary to argue the case to that extent, because if the acts do not amount to a reduction into possession, the right of survivorship accrues, as the assignee cannot stand in a better situation than the husband, the bankrupt." After referring to *Wall v. Tomlinson*, 16 Ves. 413, and *Glaister v. Hewer*, 8 Ves. 207, his Honor said that for these reasons, and upon these authorities, he was of opinion that the widow was absolutely entitled to the whole of the funds in question, except that part which was purchased with the sum paid to the husband without any condition. . . . That small sum belonged to the bankrupt's estate, as it had been reduced into possession, and invested without consideration in the names of the trustees for the wife's benefit.

Where a trustee has reason to believe that the husband and wife have agreed to settle a sum of money in his hands, and especially if the wife does not distinctly express a wish that payment is to be made to her husband, he would be justified in paying the money into Court. *In re Bendyshe*, 3 Jur. N. S. 727; but see *Penfold v. Bouch*, 4 Hare, 271.

The equitable principle of a wife's claim to a reasonable and adequate provision out of her equitable *choses in action*, or out of any property of hers which is under the jurisdiction of the Court of Chancery, is generally adopted and enforced in this country. It is familiarly applied in New York,

Maryland, South Carolina, Georgia, and Kentucky, as will be seen by subsequent references; and it is also recognized and sustained in Maine, Vermont, Virginia, Tennessee and Alabama: *Tucker v. Andrews*, 13 Maine, 124, 128; *Chase v. Palmer*, 25 Id. 342, 348; *Short v. Moore*, 10 Vermont, 446, 451; *Wilks v. Fitzpatrick*, 1 Humphreys, 54, 58; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423; *Guild v. Guild et als.*, 16 Id. 122, 123; *Wiles v. Wiles*, 3 Maryland, 1; *James v. Gibbs*, 1 Paton & Heath, 277; *Lay v. Brown*, 15 B. Monroe, 295; *Ward v. Amory*, 1 Curtis, 419; *Barron v. Barron*, 24 Vermont, 375. It is likewise enforced in Massachusetts, as far as the equity powers of that state permit; *Page v. Estes*, 19 Pickering, 269, 271; *Gassett and others v. Grout and Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543; removing any doubts created by *Sawyer v. Baldwin*, 20 Pickering, 378, 387. As to its adoption in New Hampshire, see *Parsons v. Parsons et al.*, 9 New Hampshire, 309. In Pennsylvania, though it was formerly considered that from the want of adequate chancery powers in the courts of that state, the wife's equity would not be enforced; (*Yohe v. Barnet*, 1 Binney, 358, 365; and see *Slifer and others v. Beates and another*, 9 Sergeant & Rawle, 166, 183; and *Johnson v. Matson*, 1 Penrose and Watts, 371, 373;) it has since been held that there is no insuperable difficulty in giving effect to this claim, through the medium of imposing terms and conditions to the recovery of the wife's *choses in action* at law, by the husband or his assignees; and that, wherever a court of chancery would protect the

wife, or give her relief, in a suit brought in equity or at law to recover property belonging to her, the same thing can be done in Pennsylvania, by preventing a recovery except on terms: *Rees v. Waters*, 9 Watts, 90, 94. The existence of this equity was at one time thought doubtful in Virginia; see *Gregory's Adm'r v. Marks's Adm'r*, 1 Randolph, 355, 372. "This rule," said Marshall, C. J., in *Gallego v. Gallego's Executor*, 2 Brockenbrough, 286, 288, "has never been recognized, so far as we are informed, in the courts of Virginia: but it has never been denied, and we can conceive no principle on which it should be denied. That those who ask equity should do equity, is a fundamental rule of that court, which enters into, and mingles with, all its decisions; and that the property of a married woman should not be taken from her, without making some provision for her, is as equitable in Virginia, as elsewhere." Since that time, it appears to be fully received in Virginia. *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; see, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98, 104. North Carolina seems to be the only state in which this jurisdiction is wholly denied and rejected: *Bryan v. Bryan*, 1 Devereux, Equity, 47; *Lassiter v. Dawson*, 2 Id. 383.

A sufficiently good account of this equity is given in *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372.—"By the common law," it is there said, "all the chattels which belonged to the wife before marriage, or to which she becomes entitled in her own right, are vested in the husband absolutely, with respect to things in possession, and he may dispose of

them as he pleases; but with respect to things in action, although the right to reduce them into possession is by law vested in him, the courts of equity have built up a system founded on good sense and common justice, which is intended to secure to the wife a suitable provision for her support and sustenance. The interest which the wife has in *choses in action*, which belonged to her at the marriage, constitutes what is technically called the wife's equity; with respect to which it may be laid down as a general rule, that if it be within the reach of the court, as if it is vested in trustees, or has been paid into court, or in any other situation which brings it within the control of this court, it will not be permitted to be removed out of that jurisdiction until an adequate provision is made for the wife, unless she has been already sufficiently provided for, or on her personal examination she thinks proper to waive the benefit of this protection."

But though the wife's claim to a settlement out of her equitable estate, is admitted to be founded, inherently, in reason, and natural justice, and an enlightened humanity, (see *Helms v. Franciscus*, 2 Bland, 545, 576; *Bell et al. v. Bell*, 1 Kelly, 637, 639, 640;) it did not come into application as a ground of original jurisdiction in chancery. It was enforced only incidentally, and as a part of the practice of the court, in the course of a suit by the husband or his representative for the wife's *choses in action*. It is now dealt with more expansively and liberally; but its extent is still uncertain, and to be determined by a reference to actual decisions, and perhaps varying in the administration of different tribunals.

The practice, which constituted, originally, the extent of the relief given upon this subject, and which may be considered as fully established in all courts in which this equity is recognized at all, is, that whenever the husband, or any one claiming under him, files a bill in equity to recover the wife's property, a reasonable settlement upon herself and her children will be required, unless waived by her upon a separate examination; the principle being, as it is said, that those who ask equity must do equity, and therefore that a court of chancery will not lend its aid, except on terms of the applicant's giving effect to the wife's equity for a provision. And the doctrine may now be considered as expanded into this general principle; that whenever the wife's property is under the jurisdiction of the court, in such a manner that it requires a decree or order of the court to put a party rightfully in possession of it, the court will not deliver it over, except upon terms of settlement being made. See *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Glen v. Fisher*, 6 Id. 33, 36; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 290; *Groverman and Wife v. Diffenderffer*, 11 Id. 15, 22; *Helms v. Franciscus*, 2 Bland, 545, 575; *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372; *Myers v. Myers*, 1 Bailey's Equity, 24, 31; *Yeldell et al. v. Quarles and Wife*, Dudley's Equity, 55, 56; *Hill v. Hill*, 1 Strobhart's Equity, 2, 24; *Bennett et ux. v. Dillingham*, 2 Dana, 436, 437; *Thomas, &c. v. Kennedy*, 4 B. Monroe, 235, 237; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423; *Wilks v. Fitzpatrick*, 1 Humphreys, 54, 58; *Bell et al. v. Bell*, 1 Kelly,

637, 641; *Napier and others v. Howard*, 3 Id. 193, 204; *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; *Page v. Estes*, 19 Pickering, 269, 271; *Gassett and others v. Grout and Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543. The wife's equity will be enforced, not only where the husband's title to her property is equitable, as, where he sues for his wife's legacy, or distributive share, but also where the title of the claimant only, against or through the husband, is equitable, as where a creditor or assignee seeks to charge or recover a debt, or other legal choses in action, due to the wife before marriage; see *Gassett and others v. Grout*; *Davis and others v. Newton*; *Smith v. Kane*, 2 Paige, 303. The proceeds of the wife's real estate, remaining in court, and subject to its disposition, will also be made liable to this equity; *Hill v. Hill*, 1 Strobhart's Equity, 2, 26.

The general rule, still, appears to be, that if the husband or his assignee can obtain possession of the property, without coming into chancery, that is, by suit at law, or by delivery without suit, this equity will not be enforced, and that it is only when the property has been brought into court, or is there, upon other grounds, or is under the care of the court, that chancery will grant this relief. See *Heath v. Heath and others*, 2 Hill's Chancery, 100, 104; *Udall v. Kenney*, 3 Cowen, 591, 599, 609; *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98, 103, 104; *The State v. Krebs*, 6 Harris & Johnson, 31, 37. This, according to the weight of authority, is the rule in ordinary cases; but there are some distinctions on the subject, which must be attended to.

There is a class of cases which go considerably further, though they profess to go upon the same principle, that the property is under the jurisdiction and control of the court: these are, where a person has married a ward of chancery, without permission, and thereby committed a contempt of the court. In such cases, the court will restrain the husband and his creditors from taking possession of her estate, until a settlement is made upon the wife and the issue of the marriage: but this is quite distinct from the ordinary doctrine of the wife's equity, for it extends to all kinds of property, and the settlement is usually of the whole estate, or the full value of it. See *Kenney v. Udall*, 5 Johnson's Chancery, 464, 473; S. C., on error, *Udall v. Kenney*, 3 Cowen, 591, 602, 609; *Van Duzer v. Van Duzer*, 6 Paige, 366, 369; *Van Epps v. Van Deusen*, 4 Id. 65, 74; *Helmes v. Franciscus*, 2 Bland, 545, 577; *Chambers v. Perry*, 17 Ala. 726; *post*, vol. 2, note to *Eyre v. The Countess of Shaftesbury*.

There is yet another class of decisions, which indicate that where the husband has misbehaved, and abandoned or ill-treated his wife, so as to justify a divorce or separation, the wife's property in action, and it seems, also, even property not under the jurisdiction of the court, will be laid hold of by the Court of Chancery, and appropriated to the support of the wife and her children: see *Haviland v. Myers*, 6 Johnson's Chancery, 25, 178; *Van Duzer v. Van Duzer*, 6 Paige, 365, 368; *Martin v. Martin and another*, 1 Hoffman, 462, 467; *Helms v. Franciscus*, 2 Bland, 545, 574; *Rees v. Waters*, 9 Watts, 90. See also *Renwick v. Renwick*, 10 Paige, 421, 425.

It may probably, also, be considered as established, that if the husband is entirely insolvent, and the wife is without means of support, equity will sustain a bill by the wife, through her next friend, against the husband, or his assignees, or creditors, seeking to get possession of the property at law; see *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Martin v. Martin and another*, 1 Hoffman, 462, 467: and *Bell et al. v. Bell*, 1 Kelly, 637, and *Guild v. Guild and others*, 16 Alabama, 122, are direct authorities for that position. But see *Martin v. Trigg, &c.*, 7 B. Monroe, 528. And when the case is in other respects proper for relief, and the husband is within the limits of the jurisdiction of the court, the mere circumstance, that the property is in another State, or country, will not be a bar to the interposition of equity; *Gould v. Gould*; see *post*, vol. 2, note to *Penn v. Lord Baltimore*.

But that chancery will, in common cases, in the ordinary administration of the wife's equity, and when there is no insolvency, or special misconduct, or incapacity, on the part of the husband, sustain an original proceeding by the wife for the enforcement of her claim, when the property is not under the jurisdiction of the court, cannot be considered as yet established. In the New York chancery cases, indeed, there are numerous *dicta* asserting that general proposition, and saying that a bill may be sustained against the husband or his assignees who may be proceeding at law: see *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Dewall v. Covenhoven*, 5 Id. 581, 582; *Van Duzer v. Van Duzer*, 6 Id. 366, 370; *Fry v. Fry*, 7 Id. 461, 463; *Martin v. Martin and another*, 1 Hoffman, 462,

468; and see also *Davis and others v. Newton*, 6 Metcalf, 537, 543; *Bell et al. v. Bell*, 1 Kelly, 637, 641: but there is yet wanting the authority of an adjudged case, in this country, applying this practice, upon the mere general ground of the wife's equity, and where there is not a special equity arising from the wife's destitution on account of the husband's misbehavior, or incapacity, to support her. In *Carter v. Carter*, 1 Paige, 463, the husband was a lunatic; and, no committee having been appointed, the court, after asserting the wife's equity, on the principle in *Kenney v. Udall*, ordered the property to be transferred to an officer of the court. The remarks of Rogers, J., in *Rees v. Waters*, 9 Watts, 90, inclining to the view, that where the husband sued at law, equity might interpose and compel a settlement, were in a case where the husband had wholly deserted his wife. See the subject discussed at large, and the cases cited, in *Parsons v. Parsons et al.*, 9 New Hampshire, 309.

It is agreed, on all hands, that if the property has been actually reduced into possession, or is not a mere right, or thing in action, but a complete legal estate vested in the husband, the wife's equity can no longer be enforced; *Rees v. Waters*; *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Van Duzer v. Van Duzer*, 6 Id. 366, 370; *Wickes v. Clarke*, 8 Id. 161, 172; *Whitesides v. Dorris, &c.*, 7 Dana, 101, 108; *Thomas v. Sheppard*, 2 M'Cord's Chancery, 36, (but see remark on this case in *Heath v. Heath and others*, 2 Hill's Chancery, 100, 107;) *Perryclear v. Jacobs*, Id. 504, 509; *Mitchell v. Sevier et als.*, 9 Humphreys, 146. But if the fund,

after being in court, is wrongfully paid out by a master to the husband without an order, the wife's equity, which had attached to it, will not be defeated; *Wardlaw v. Adm'rs and Heirs of Gray*, Id. 644, 652, 653. And to render payment, or delivery to the husband a bar to the equity of a wife to a settlement, or her legal title as survivor, the property must be received or held by him, in his own right, and not merely for the benefit of, or in trust for, the wife; *Barron v. Barron*, 24 Vermont, 375; and his declarations may be given in evidence, to show the character and purpose in, and for which, the payment was made and received; *Gray's Estate*, 1 Barr, 329; *Goochenaaur's Estate*, 11 Harris, 460.

It is well settled, that the wife's equity will be sustained, not only against the husband, but against all persons claiming under him, and through the medium of his rights. It will be enforced against his assignees, whether by act of law, such as assignees under a bankrupt or insolvent law; *Wiles v. Wiles*, 3 Maryland, 1; or by his voluntary act, and whether the assignment be general or special, and where it has been made for a valuable consideration without notice, or to a creditor in discharge of a just debt; and against his execution-creditors seeking to subject the property to the debts of the husband, or creditors claiming in any manner whatsoever. The equity of the wife is paramount to the interest, powers, and rights of the husband, and of all persons dealing with him. An assignee for a valuable consideration, may take a *chose in action* freed from the wife's contingent right of survivorship; but he cannot take it discharg-

ed from the wife's equity to a settlement. In these principles, there is no difference or doubt amongst the cases in this country. *Kenney v. Udall*, 5 Johnson's Chancery, 464, 476, 477; S. C., affirmed on error, *Udall v. Kenney*, 3 Cowen, 591, 599, 604, 606; *Haviland v. Myers*, 6 Johnson's Chancery, 25; *Mumford v. Murray*, 1 Paige, 620; *Van Epps v. Van Deusen*, 4 Id. 65, 74; *Page v. Estes*, 19 Pickering, 269, 271; *Phillips v. Hassell*, 10 Humphreys, 197; *Moore v. Moore*, 14 B. Monroe, 259; *Gassett and others v. Grout and Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543; *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372; *Heath v. Heath and others*, 2 Hill's Chancery, 100, 105, 107; *Perryclear v. Jacobs*, Id. 504, 509; S. C., *Riley's Chancery*, 47, 50; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 292; *State, use of Stevenson, v. Reigart*, 1 Gill, 3, 27; *Elliott, &c. v. Waring*, 5 Monroe, 338, 341; *Ben-nett et ux. v. Dillingham*, 2 Dana, 436, 437; *Thomas, &c. v. Kennedy*, 4 B. Monroe, 235, 237; *Bowling and Boucher v. Winslow's Adm'r*, 5 Id. 29, 31; *Hord v. Hord, &c.*, Id. 81, 85; *Athey, &c. v. Knotts*, 6 Id. 24, 27; *Bowling's Adm'r v. Bowling et al.*, Id. 31; *Bell et al. v. Bell*, 1 Kelley, 637, 642, 643; *Napier and others, v. Howard*, 3 Id. 193, 204; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423, 424; *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; *Sherrard v. Carlisle*, 1 Patton & Heath, 12; see, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grat-tan, 98.

The wife's equity extends, in all cases, to a provision for her children

as well as for herself; *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Udall v. Kenney*, 3 Cowen, 591, 609; *Mumford v. Murray*, 1 Paige, 620; *Duval v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 290; *Groverman and Wife v. Dufferffer*, 11 Id. 15, 22; *Helms v. Franciscus*, 2 Bland, 545, 581; *Napier and others v. Howard*, 3 Kelley, 193, 205; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423. But the provision for children is a part of the wife's personal equity, and is not an independent and substantive equity in the children. Therefore, although when the wife has asserted her claim, and an order for a settlement has been made, and she dies before the settlement is completed, it has been thought that the children have acquired a vested interest, which will be carried through for their benefit; see *Mumford v. Murray*, 1 Paige, 620, 621; *Helms v. Franciscus*, 2 Bland, 545, 581; *Sherrard v. Carlisle*; yet, if the mother has taken no step to enforce her equity for a settlement, and has no contract for it, or if she has waived it, her children surviving her have no claim on the estate for a provision; *Barker, Executor, &c. v. Woods*, 1 Sandford, 129, 131; *Martin v. Sherman*, 2 Id. 341, 343; *Greer's Heirs v. Boone*, 5 B. Monroe, 554, 557; *Bell et al. v. Bell*, 1 Kelly, 637, 641.

The equity of the wife is to a reasonable and adequate settlement upon herself and her children; and the adequacy will depend upon all the circumstances of the case, to be ascertained upon a reference to a master; and the settlement may extend to the whole or a part of the property; *Kenney v. Udall*, 5 Johnson's Chancery, 464, 478; *Udall v. Kenney*, 3 Cowen,

591, 606; *Haviland v. Myers*, 6 Johnson's Chancery, 25, 27; *Napier and others v. Howard*, 3 Kelly, 193, 205; *Phillips v. Hessel*, 10 Humphreys, 197; *Hall v. Hall*, 4 Maryland Ch. 283; *McVey v. Boggs*, 3 Id. 94. The term *adequate* is a relative term, and in determining the question of adequacy, regard will be had to the whole extent of the fortune brought by the wife; *Ex parte Beresford*, 1 Dessausure, 263, 268. In ordinary cases, the courts will not require the whole to be settled upon the wife; but if the husband be entirely insolvent, and there be no other provision for the wife, or if it be a case in which he has married, without permission, a ward of the court, the whole may be appropriated to the wife; *Helms v. Franciscus*, 2 Bland, 545, 577; *Bowling and Boucher v. Winslow's Adm'r*, 5 B. Monroe, 29, 31.

In like manner, the wife's equity is, in general, for a provision to take effect after the death of the husband, and he is entitled to the interest during his life, where he lives with and supports her; but, again, if the husband has deserted or ill-treated her, or is wholly insolvent, and the wife destitute, the maintenance provided for her, will be directed to commence immediately, and the income will be ordered to be paid to her, or to a trustee for her; *Dumond v. Magee*, 4 Johnson's Chancery, 318, 322; *Kenny v. Udall*, 5 Id. 464, 480; S. C., 3 Cowen, 591, 607, 609; *Helms v. Franciscus*, 2 Bland, 545, 574; see also, *Starrett v. Wynn and another*, 17 Sergeant & Rawle, 130.

Where an assignee or creditor of the husband files a bill to reach the wife's property, she may interpose her claim to a settlement, by petition,

without resorting to a bill; and the practice of the court, in all cases, is to refer it to a master to inquire and report whether any and what settlement ought to be made; *Mumford v. Murray*, 1 Paige, 620, 621; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 293. When the husband himself is suing for a legacy or distributive share due to the wife, she must be made a party to the bill, and then a provision will be compelled, unless she waive it; *Schuyler v. Hoyle*, 5 Johnson's Chancery, 196, 210; *Ringo et al. v. Warder, &c.*, 6 B. Monroe, 514; *Chase v. Palmer*, 25 Maine, 342, 348: and the practice appears, formerly, to have been to impound the property until the husband proposes terms of settlement before a master, and for the court to judge of the sufficiency; but probably, now, the court will order a master to inquire and report what are proper terms; see *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Hill v. Hill*, 1 Strobhart's Equity, 2, 24. The court will not, *ex officio*, withhold the property or money from the husband until a settlement is made, nor will it order a settlement, absolutely, upon the application of a stranger, without the consent of the husband; the application for a settlement must be from the wife herself, or her guardian, or attorney, or some one standing in a similar situation to her: but on the other hand, the court will not order the property to be transferred to the husband, until the wife has been consulted: of its own motion, it will merely direct an inquiry, whether any, and what provision has been made for the wife, and whether the wife will consent that the fund shall be paid to the husband; *Myers v. Myers*, 1

Bailey's Equity, 24, 32; *Yeldell et al. v. Quarles & Wife*, *Dudley's Equity*, 55; see also *Helms v. Franciscus*, 2 Bland, 545, 575. It would seem to follow, and has been held, that when the wife is an infant, the court will direct what seems in its discretion an adequate settlement, notwithstanding her wish or request that the whole should be paid over, absolutely, to her husband; *Phillips v. Hessel*, 10 Humphreys, 197.

The wife's equity is so substantial an interest, that it will constitute a valuable consideration for a post-nuptial settlement by the husband upon the wife. A voluntary settlement, upon such a basis, will, to the extent of that equity, be supported in Chancery, as against creditors: *Wickes v. Clarke*, 8 Paige, 161, 166; S. C., 3 Edwards, 58, 63; *Partridge v. Havens*, 10 Paige, 618, 624; *State, use of Stevenson v. Reigart*, 1 Gill, 3, 27; *Helms v. Franciscus*, 2 Bland, 545, 576, 579; *Perryclear v. Jacobs*, 2 Hill's Chancery, 504, 509, 510; S. C., *Riley's Chancery*, 47, 50; *Sibely & Morrison v. Tutt*, 1 M'Mullan's Eq. 320, 328. "I think it may be assumed as a rule," said the Vice-Chancellor, in *Wickes v. Clarke*, "that the same circumstances which would induce the court to compel a settlement by the husband or those claiming under him or in his right, will operate to uphold a deed of settlement already made, to the same extent that would be required if one should be directed to be made under the view of the court." See, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98.

In looking at the various cases upon the present subject, it is obvious that the wife's equity to a settlement out of her equitable choses in action, is a

distinguishable principle from the wife's claim to a maintenance out of her estate in the case of her husband's neglect or failure to support her. The former takes effect after her husband's death, the latter immediately: the former extends to only a part of the fund in question, the latter may embrace the whole of it: the former applies only upon equitable interests which are still *sub judice*, the latter may be enforced against property which is fully under the control of the husband. Nor is the latter to be considered as an extended branch of the other; it appears to come from a different root, and to be a part of that suspension, or arrest, of the legal powers and rights of the husband, in respect to the wife's separate estate, which chancery enforces upon breach of the legal obligations and duty to support the wife, whether that breach of duty arise from moral, or from prudential misconduct, from unwilling-

ness or from incapacity. The maintenance of the wife from her own property in cases of the husband's neglect to provide for her, is, no doubt, a ground of original jurisdiction, to be exercised upon a bill filed by her: but according to the best view of the authorities, that ordinary and inherent claim, known strictly as *the wife's equity*, existing where there is no allegation of misbehavior or insolvency, is not the subject of active relief from chancery, but is protected only where the husband or his representative is asking for the decree or order of the Court. In general, the wife's equity cannot be barred by any act *in pais*, nor without an examination before a judge or duly authorized officer of the court; but in *Wright v. Arnold*, 14 B. Monroe, 638, a married woman was held to be precluded from claiming against a purchaser from her husband, by standing by and assenting to the sale.

SEPARATE USE FOR FEME COVERT.

*HULME v. TENANT.

[*394]

JUNE 30. JULY 28. DECEMBER 14, 1778.

REPORTED 1 BRO. C. C. 16.¹

WIFE'S SEPARATE PROPERTY.]—*Bond of a feme covert, jointly with her husband, shall bind her separate property.*

THE bill was filed by the obligee of a bond, to secure £180, entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Upon the marriage, the estates of the wife had been conveyed to trustees; one part, consisting of freehold and leasehold lands, in trust to *receive and*

¹ S. C., 2 Dick. 560, Reg. Lib. 1778. A. fol. 90.

pay the rents and profits to the wife for her separate use, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint; in default of appointment, to the use and behoof of her heirs and assigns; other parts to be sold, and out of the produce, £1000 to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal to her, or her order, by note or writing under her hand; and for want of such appointment, to her executors, administrators, and assigns.

This £1000 had been raised, and the whole, or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate.

In 1769, the husband borrowed of the plaintiff, Mrs. Hulme, £50, upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff, and borrowed £130, paid the interest due upon the former sum of £50, and [the husband and wife] gave a new bond for the £180.

[*395] *The cause had been heard before Lord Bathurst, who dismissed the bill. It came on now to be re-heard.

Mr. *Mansfield* opened for the plaintiff, but the reporter was absent.

Mr. *Attorney-General*¹ for the defendants.—The plaintiff is not entitled to the relief of a court of equity, but is to be left to make the best she can of the security at law. Trustees for a woman are appointed for the purpose of preventing her from doing acts prejudicial to herself, under the influence of her husband. The husband's credit not being good, the plaintiff has taken the wife's bond. The husband was indebted. He and his wife are co-obligors, and it is done with the approbation of the plaintiff's attorney, who must know it was void. He ought to have insisted upon a mortgage of her separate property. This Court will never look upon bonds as appointments where the party could not enter into the bond. In many cases of bonds with penalties, the Court considers the bond as the form only, and as evidence of the substance, and will not suffer the party to be free upon payment of the penalty; but in the case of an infant, where it is voidable only, the taking of the bond will not aid the taker in equity. I do not contend that a married woman cannot contract in respect to her separate property, but the party contracting must take a security agreeable to the nature of the property; he cannot better his security. *Peacock v. Monk*,² 2 Ves. 190,² closes with a dictum, the authority of which is very doubtful; it had no affinity to the principal question.

Mr. *Selwyn*, on the same side.—There is no case where the point has been determined that a bond, in which the wife joins her husband, binds her separate property. *Norton v. Turvill*, 2 P. Wms. 144,³ was against the wife's representatives, which is very different from the present against the separate property settled upon her for life.

[*Lord Chancellor Thurlow*.—*Grigby v. Cox*, 1 Ves. 517, appears to be a

¹ Wedderburne.

² See Belt's Suppl. 342.

³ 2 Eq. Ca. Ab. 152, pl. 14.

decree for a specific performance. The *defect of that case is, that it does not state the trust. It is said that a feme covert is to be considered as a feme sole, with respect to every authority she can exercise over her separate estate; but it is different where the consent of the trustees is made essential to the conveyance, although the mere appointment of trustees is not sufficient to deprive her of that authority; for there must be trustees,¹ otherwise she could have no separate property.] [*396]

Mr. *Selwyn*.—In *Biscoe v. Kennedy*,² Sir Thomas Clarke thought it was to be considered as the property of a feme sole; but, in that case, the bond was given before the marriage of the parties.

[*Lord Chancellor Thurlow*.—Do you consider that case as deciding that her property was liable to her acts only whilst she was a feme sole?]

Mr. *Selwyn*.—A feme covert can execute no act except by virtue of a power, or with the consent of the trustees, or by some means referring to her separate property; but, in this case, there is no reference whatsoever to her separate property, or consent of trustees. It is not wholly immaterial that the plaintiff has sued at law. In *Machorro v. Stonehouse*, in July last, upon marriage, a sum was agreed to be laid out in the funds, upon trust that the dividends should be to the separate use of the wife; the plaintiff bought the interest during the lives of the husband and wife, for eight years' purchase; there was no fraud. A bill was brought against the trustee for a transfer. Mrs. Stonehouse, in her answer, insisted this was against her consent, but there was evidence in the *cause, that they had both consented. This bill, so circumstanced, was dismissed with costs, by his Honor (Sir Thomas [*397] Sewell,) who seemed shocked at the proposition that a married woman could be bound by an act done in conjunction with her husband.³

¹ Trustees are not essentially necessary for the creation of a trust for the separate use of a married woman, as the husband will be converted into a trustee for her. See *Bennet v. Davis*, 2 P. Wms. 316; *Parker v. Brook*, 9 Ves. 583; *Rich. v. Cockell*, 9 Ves. 369.

² *Biscoe v. Kennedy*, at the Rolls, 21st July, 1762. The defendant, Jane Kennedy, then the widow of Ormond Tomson, Esq., being indebted to the plaintiff Biscoe, in £114 by bond 22nd of April, 1755, and being possessed of several leasehold houses, and of £1000 East India Stock, by settlement on her marriage with the defendant James Kennedy, all her personal estate (excepting £500 East India Stock, which the husband was to have) was conveyed to the defendant M'Culloch, in trust for the separate use of the defendant Jane. The marriage having taken effect, the plaintiff filed his bill (without having sued the husband) to have the separate estate of the wife applied to the payment of the debt; which bill was dismissed. The plaintiff then sued out writs against James and Jane Kennedy; but James Kennedy absconding, could not be served, and the plaintiff proceeded to outlawry, and then filed this bill, to be paid out of the wife's separate estate. The defendant insisted, that during her husband's life, her separate property was not liable to this debt, contracted by her while sole. The plaintiff contended that the settlement as to him was fraudulent. Upon the hearing his Honor declared that upon the circumstances of the case, the effects of the defendant, vested in her trustee, were to be considered as the property of a feme sole, and ordered the plaintiff's debt and costs to be paid out of the £500 East India Stock, in the hands of the trustee.

³ Sed vide contra, *Stanford v. Marshall*, 2 Atk. 68; *Pybus v. Smith*, 3 Bro. C. C. 340.

Mr. *Mansfield*, in reply.—It is now laid down that a woman, having separate property, cannot dispose of it but by the means pointed out by the settlement, and with the consent of her trustees. It seemed to me that a feme covert, having separate property, was to that intent¹ a feme sole, and might borrow money and give securities. The consent of the trustees has been decided not to be necessary; the use of trustees being only to guard it against the husband. Here, it is to such uses as she, by deed or will, should appoint. Mr. Attorney-General and Mr. Selwyn argue upon the ground that the bond was void; that is begging the question. If we are right, though void at law, it is not void here. The latter of these two bonds, that to secure £180, was given on the mere motion of the wife; no objection arises from the plaintiff's having sued at law: it was a legal security against the husband. As to an infant's bond: an infant is never considered here as an adult, but a feme covert is very often considered as a feme sole. In *Norton v. Turvill*, the assets were considered as being bound when she was dead; then her property must have been bound whilst she was living. That case is decisive of the present question. The dictum in *Peacock v. Monk* is mentioned as falling from Lord Hardwicke, and naturally, as being the general rule governing the property of women, and taking that particular case out of the rule. In *Biscoe v. Kennedy*, the separate property could not be the subject in dispute, the debts of a feme sole falling on her husband. In *Machorro v. Stonehouse*, the woman lived separate from the husband, and probably some fraud struck the learned judge.

LORD CHANCELLOR THURLOW.—My doubt arises principally upon the form [*398] of the relief, rather than the principles *upon which the bill is brought; it is a bill brought by the obligee upon a joint bond by husband and wife for £180, to recover that sum out of the separate property of the wife. It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.

The question is, what sort of execution this Court will award against that separate property? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses; and, for want of such declaration or appointment, to the use and behoof of the wife, her heirs and assigns; as to other parts, in trust, to be sold, and out of the produce of the sale, £1000 to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her or her order, by note or writing under her hand; and, for want of such appointment, to her executors, administrators, and assigns.

The rule laid down in *Peacock v. Monk*, 2 Ves. 190, that a feme covert

¹ Qu. extent.

acting with respect to her separate property, is competent to act in all respects as if she was a feme sole, is the proper rule, and necessary to support the decisions on this subject. The consequence was, that, in *Allen v. Papworth*, 1 Ves. 163,¹ where a bill was brought by husband and wife for an account, the wife, together with her husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate estate were, by decree, directed to be so applied. In *Grigby v. Cox*, where the wife had contracted to sell her separate estate, being authorized by settlement to dispose of it, the Court bound her, as a person equally competent as if sole, to a specific performance of that *contract : I take it, therefore, it is impossible to say, but that *a feme covert is competent to act as a feme sole, with respect to her separate property, where settled to her separate use.* [*399]

But the question here goes a little beyond that ; it is not only how far she may act upon her separate property : I have no doubt about that ; but *the question is, how far her general personal engagements shall be executed out of her separate property.* If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition ; but if she enters into an engagement, which would make a feme sole liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such general engagement, entered into by a feme covert, will not bind her as such. It is not like the case of an infant, who is incapable of acting ; but in respect to a feme covert, determined cases seem to go thus far, *that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement ; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands, or rents and profits, according to the exigency of justice, or of the engagement of the wife, to be carried into execution.*² I know of no case which has gone further than that. Suppose the wife to have power, by settlement, to dispose of her real estate to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage, or otherwise, raise the money to satisfy that general *engagement on the part of the wife. [*400] It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife, by the hand of the trustee, who consequently is no longer liable as to that sum ; so that so

¹ See a fuller and more correct statement of the case in Belt's Suppl. p. 91.

² See also *Francis v. Wigzell*, 1 Madd. 258 ; *Aylett v. Ashton*, 1 My. & Cr. 105, 112.

far as the £1000, it seems out of the reach of this Court, the trustee alleging that the money is paid, or not remaining in his hands.—[Mr. Ambler.—Only part paid over.]—I believe there is no instance of a personal decree against a feme covert, for payment of any sum whatever. Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it. As a bond it is void, otherwise an extent might have gone.

¹ LORD CHANCELLOR THURLOW.—I have no doubt about this principle, that, *if a court of equity says a feme covert may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c.* But, although the remedy here is more extensive than in a court of law, I do not find the Court has ever ordered a power to be executed; it has industriously stopped short of so doing, and has only given a remedy by stopping the fund, where the power was executed; therefore, I cannot order the feme covert to execute her power, but I am exceedingly clear that the leasehold estate will be liable.

It stood referred to the Master to take an account of the rents and profits of the leasehold estates; but, before any report, the parties came to a compromise, upon the defendant Frances paying the principal sum borrowed, with interest, without any costs.²

[*401] **“That at law,”* observes Lord Brougham, C., *“a feme covert cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty, she cannot; and, although living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him; yet, even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognized than is the cestui que trust or the mortgagor, the legal estate, which is the only interest the law recognizes, being in others.*

*“But, in equity, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and trustees. It may be added that the current of decision has generally run in favor of such recognition. The principle has been supposed to be carried further in *Hulme v. Tenant*, than it had ever been before, because there a bond, in which the husband and wife joined, and which, indeed, so far as the obligation of the wife*

¹ July 28, 1778.

² See *Standford v. Marshall*, 2 Atk. 68; *Socket v. Wray*, 4 Bro. C. C. 483.

was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could only be reached by implication; and though, till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by himself." *Murray v. Barlee*, 3 My. & K. 220, 222.

Wife's power of disposition over her separate estate.—The rule laid down in *Peacock v. Monk*, that a feme covert, acting with respect to her separate property, is competent to act in all respects as a feme sole, is said by Lord Thurlow, in *Hulme v. Tenant*, to be the proper rule, and necessary to support the decisions on this subject.

Thus, it has been established ever since the case of *Fettiplace v. Gorges*, 1 Ves. jun. 46; S. C., 3 Bro. C. C. 8, that *personal* property settled upon a feme covert for her separate use, is to be enjoyed with all its incidents; and that, as the *jus disponendi* is one of them, she may, although there is no express power of disposition given to her, dispose of it, either by acts *inter vivos*, or by will, (*Rich v. Cockill*, 9 Ves. 359; **Wagstaff v. Smith*, 9 Ves. [*402] 520; *Thackwell v. Gardiner*, 5 De G. & Sm. 58; *Hodgson v. Hodgson*, 2 Kee. 704; *Humphrey v. Richards*, 2 Jur. N. S. 432;) and the power of a married woman to dispose of personal property settled to her separate use extends to interests in reversion, as well as those in possession: *Sturgis v. Corp*, 13 Ves. 190.

Where a married woman making a will has property settled to her separate use to satisfy the words of her will, it will not be held to be made in execution of a special power to which she does not refer: *Evans v. Evans*, 26 L. J. N. S., Ch. 193; 5 W. R. 169, M. R. Secus, where the will of a married woman having a general power would, if not held to be in execution of it, be inoperative: *Shelford v. Acland*, 5 W. R. 170.

As to *real* estate, it has been held, that when it was settled to the separate use of a feme covert, she could not, without an express power of appointment, dispose of it by will or otherwise than by fine or recovery, so as to disinherit or bind her heir, (*Churchill v. Dibben*, 2 Kenyon's Rep., part 2, 68, 84; *Anon.*, cited in *Peacock v. Monk*, 2 Ves. 192; Sanders on Uses and Trusts, 380;) and it is conceived that she can only effect that object now by deed acknowledged; *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274. In the recent case of *Harris v. Mott*, 14 Beav. 169, a married woman entitled in fee to real estate devised to her separate use, contracted to sell it, but before the contract had been carried into execution died, having devised the estate to her husband in fee. The husband filed a claim against the purchaser for the specific performance of the contract. It was argued for the plaintiff, First, that her contract was binding upon her estate, and all claiming under her. Secondly, that she could dispose of the estate by her will, and that her heir was a mere trustee for her husband, and that his concurrence was a mere matter of conveyance. Sir John Romilly, M. R., however, declined in the absence of the heir, to determine that he was a mere trustee of the legal estate. "The object," said

his Honor, "of limiting the estate to her separate use was to protect her from her husband, and not to extend her power of disposition. If any distinct authority could be produced I must act on it; but none being cited, I think the case too doubtful to compel the defendant to take the title in the absence of the heir." See also *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, 273.

It is clear, however, that a feme covert has the same power over her *life interest* in real estates settled to her separate use as she would have, had she been a feme sole, and a contract to sell or mortgage her interest will be specifically enforced against her: *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. [403] *Hardisty*, 2 Beav. 363; *Willcocks v. Hannington*, 5 Ir. Ch. Rep. 38. In *Major v. Lansley*, 2 Russ. & My. 357, where a married woman, being entitled for life to her separate use, to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning it, Sir John Leach, M. R., although she had levied no fine, held her bound, after the death of her husband, by the assignment. So, in *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, where a married woman and her husband assigned a rent-charge to which she was entitled to her separate use for life, it was held by the Master of the Rolls of Ireland that the deed did not require acknowledgment under the statute for the abolition of fines and recoveries.

Upon the principle that a married woman can dispose of her separate property, she will render it liable by concurring with her trustees in a breach of trust. See *Crosby v. Church*, 3 Beav. 485; *Brewer v. Swirler*, 2 Sm. & G. 219; *Hanchett v. Briscoe*, 22 Beav. 496.

Lord Thurlow, in *Hulme v. Tenant*, following the opinion that at one time was prevalent, thought that trustees were essentially necessary to the existence of separate property. It has, however, been long since established, that, if real or personal estate be given to or settled upon a married woman for her separate use, without the interposition of trustees, still, in equity, the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her, (*Bennet v. Davis*, 2 P. Wms. 316; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375; *Rollfe v. Budder*, Bunb. 187; *Prichard v. Ames*, 1 T. & R. 222; *Newlands v. Paynter*, 10 Sim. 377; 4 My. & C. 408; *Archer v. Rorke*, 7 Ir. Eq. Rep. 478;) and where there are trustees, (notwithstanding the decision of Lord Rosslyn in *Whistler v. Newman*, 4 Ves. 129; and *Mores v. Huish*, 5 Ves. 692,) it is now clear, that a married woman can bind her separate property, without their assent, unless it is rendered necessary by the instrument giving her that property. See *Essex v. Atkins*, 14 Ves. 542, where the grant of an annuity by a married woman out of personal property settled to her separate use was established, without the assent of the trustees. See, also, *Grigby v. Cox*, 1 Ves. 518; *Pybus v. Smith*, 1 Ves. jun. 193; and *Parke v. White*, 11 Ves. 223. The cases of *Whistler v. Newman*, and *Morse v. Huish*, may, therefore, be considered as overruled. Indeed, it has been held that, where a trustee has received notice of a charge made by a married woman on her separate property, in his hands, he will be held personally liable to payments subsequently made to her: *Hodgson v. Hodgson*, 2 Kee. 704.

*A married woman may give to her husband the same interest in her separate property, as she can to any other person, (*Essex v. Atkins*, [404] 14 Ves. 542; *Grigby v. Cox*, 1 Ves. 518;) but where it consists of a fund in court, it will not be paid to her husband, unless her consent is taken in court: *Milnes v. Busk*, 2 Ves. jun. 488, 500; *Wordsworth v. Dayrell*, 4 W. R. 689.

A husband may also give property to trustees, or make himself a trustee for the separate use of his wife. But in order to constitute a gift between husband and wife there must be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. See *Mews v. Mews*, 15 Beav. 529; there a farmer's wife, with his knowledge and sanction, deposited the produce of the surplus butter, eggs, and poultry, with a firm in her own name, and he called it "her money." On his death-bed he gave his executor directions to remove the money, and do the best he could with it for his wife. It was held by Sir John Romilly, M. R., that the evidence was not sufficient to establish a gift between them, and that the husband had neither made himself nor the firm trustees for his wife. See also *Barrack v. McCulloch*, 3 K. & J. 110.

Although a parol agreement before marriage that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under the dominion of the trustees and treated as separate property, the agreement may be made effectual: *Simmons v. Simmons*, 6 Hare, 352.

Liability of wife's separate estate to her debts and contracts.—In the cases before mentioned, the married woman has acted with respect to her separate property, and thus shown her intention to deal with it.

The point decided by *Hulme v. Tenant*, goes much farther than that, and shows that her separate property will be bound by *general engagements in writing* which do not refer to, or make mention of it. It has accordingly been frequently held, that the separate estate of a feme covert is rendered liable to pay her bond, (*Lillia v. Airey*, 1 Ves. jun. 277; *Norton v. Turvill*, 2 P. Wms. 144; *Peacock v. Monk*, 2 Ves. 193;) although it be given to her husband, or although she have joined in it with him, as in *Hulme v. Tenant*; or with a stranger: see *Heatley v. Thomas*, 15 Ves. 596; *Sandford v. Marshall*, 2 Atk. 68. The same was held as to a bill of exchange, accepted by a feme covert, in *Stuart v. Lord Kirkwall*, 3 Madd. 387; and *Owen v. Homan*, 4 H. L. Cas. 997; and as to a promissory note given by a feme covert in *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; and the separate estate of a feme covert has been held to be bound by an agreement entered into by her without the knowledge of her husband, to pay an additional rent for a house: *Master v. Fuller*, 4 Bro. C. C. 19; 1 Ves. jun. 513. So on an agreement to take a house for a term of years, payment of the past rents was enforced as a charge upon her separate estate. *Gaston v. Frankum*, De G. & Sm. 561; 16 Jur. 507. And in *Murray v. Barlee*, 3 My. & K. 210, it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V. C., that the separate property of a feme covert was liable to

the payment of the costs of solicitors, whom she had by various letters instructed to act on her behalf with respect to it, promising or giving them to understand that she would pay the costs and charges to become due to them, for business done for her, although she did not refer to her separate property, or expressly promise to pay such costs and charges out of it. "The present," observes his Lordship, "is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie, but these are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So, if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them; that is, to pay the costs which shall be taxed."

In the case of *Barlee v. Barlee*, 1 S. & S. 100, it was held that the separate property of a married woman, in the hands of the Court, was liable to the costs of a suit instituted by her touching that property.

Where, however, a married woman whose husband was insane, instructed a solicitor to act for her and her infant children, appearing by their next friend, in a suit to which she was not a party, and which did not relate to her separate estate, it was held by Sir John Romilly, M. R., that her separate estate was not liable for the costs. "There has been," said his Honor, "a misconception of the rights and obligations attaching to the separate estate of a married woman. In *Murray v. Barlee*, 3 My. & K. 209, a married woman, in respect of her separate estate, employed a solicitor to conduct the proceedings, and it was held that her separate estate was made liable. That is no authority [*406] for creating a liability for costs in this case. Here, a married woman, whose husband, by reason of mental incapacity, was unable to take any steps, goes to a solicitor and directs him to take proceedings for her children. It is a separate and distinct matter. She was not a party to the cause, and the litigation had no relation to her or her separate estate; it was instituted merely to ascertain the rights of her children. From the situation of her husband, she was the person who naturally communicated with the solicitor, and in one sense employed him, but he knew that he was employed to protect the interests of the children, and that the next friend was liable to him; but neither the mother the children, nor her separate estate, was liable for costs incurred in this matter which did not concern her." *Re Pugh*, 17 Beav. 336.

An application by a married woman to tax a solicitor's bill, for business in respect to her separate estate, must be made by her next friend. *In re Waugh*, 15 Beav. 508. Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate. *Waugh v. Waddell*, 16 Beav. 521.

In many cases it has been erroneously held, that the general engagements of a married woman, in writing, operate and are valid only as appointments

made with reference to the separate estate, and not as mere contracts; and consequently, as a mere *verbal contract* cannot operate as an appointment, that the separate estate of a feme covert is not bound by her general engagements unless they are in writing. See *Clerk v. Miller*, 2 Atk. 379; *Dowling v. Maguire*, Ll. & G. Rep. t. Plunkett, 19; *Bolton v. Williams*, 2 Ves. jun. 142; *Greatley v. Noble*, 3 Madd. 94; *Stuart v. Kirkwall*, 3 Madd. 389; *Aguilar v. Aguilar*, 5 Madd. 418; *Chester v. Platt*, 1 V. & B. 334; *Murray v. Barlee*, 4 Sim. 82, per Sir L. Shadwell, V. C. The more recent cases, however, upon the authority of the principal case, decide that a feme covert can, as to her separate estate, enter into contracts in the same manner as a feme sole, and that her contracts or engagements, upon this principle, are equally binding whether they are written or merely verbal, and that it is therefore unnecessary, as well as incorrect in principle, to speak of her written engagements as operating merely as appointments. See *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickenson*, 1 Cr. & Ph. 53; *Master v. Fuller*, 4 Bro. C. C. 19. This doctrine has been most ably supported in Lord Brougham's elaborate judgment in *Murray v. Barlee*, 3 My. & K. 223. "In all these cases," says his Lordship, "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to *her own control, and [*407] exempt from all other enterference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly encumbered it. At first, the Court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power, was always, of course, considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert, without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general

engagement only is raised ; that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Greatley v. Noble*, 3 Madd. 79 ; and the Master of the Rolls (Sir John Leach) appears, in the subsequent case of *Stuart v. Kirkwall*, 3 Madd. 387, to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments [*408] absolutely *void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument ? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing, where that act requires none ? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods ? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing ? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delavall*, 1 Vern. 326, makes no mention of such a distinction, for there, being indebted generally is all that is stated as grounding the claim ; and in *Lillia v. Airey*, 1 Ves. jun. 277, the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60 ; the Court, however, held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond."

So also, in *Owens v. Dickenson*, Cr. & Ph. 53, Lord Cottenham, with reference to a written agreement, observed, "that within the authority of cases which have been decided, it would have been operative upon the feme covert's separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the Court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*, whereas if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power ; what it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate ; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid ; and it is not correct, according to

legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular *property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract, and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows, that, if she has a power to deal with it, she has the other power incident to property in general—namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied. . . I observe, that in *Clinton v. Willis*, (1 Sugd. Pow. 208, n.,) Sir Thomas Plumer suggested a doubt whether it was necessary they should be secured *by writing*; and it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction, not recognized in any other case. On that point, however, I give no opinion at present.”

The distinction has likewise been taken, that, as the general engagements of a feme covert are binding upon her separate estate, on the ground only of her intention that they should be a charge upon it, that therefore, when it is not her intention to contract a personal debt, or to charge a gross sum upon her separate estate, the Court cannot raise an *implied assumpsit* to charge it in opposition to her intention. Thus, in *Williams v. The Duke of Bolton*, 4 Bro. C. C. 297; S. C., 2 Ves. jun. 138, where a married woman, having separate property, had sold an annuity charged upon that property, which annuity was void for want of a proper memorial, it was held that the grantee would not have an equity specifically to affect the fund clothed with a trust for the separate use of a married woman, with the consideration, upon the ground of the difficulty of raising an implied assumpsit, contrary to the intention of the parties. See, also, *Aguilar v. Aguilar*, 5 Madd. 414, and *Jones v. Harris*, 9 Ves. 486, in which case an annuity granted by a feme covert, charged upon her separate estate, being void for want of a proper memorial, it was held that the consideration money could not be recovered out of her separate estate. “It is very difficult,” said Lord Eldon, in his judgment, “to maintain, that, where her intention was not to contract a personal debt, or to charge a gross sum upon her *separate estate, but the contract was for an annuity, which contract the party dealing with her had it in his power to make effectual, and such as to bind her according to the intention of both, and he failed in that, a court of equity ought to assist him, and to give him such a charge as she did not intend to give or he intend to have.”

In the case of *Callow v. Howle*, 1 De G. & Sm. 531, a solicitor of the husband and wife having transacted business relating to the separate estate of the wife, instituted a suit against them and the trustees of the settlement, for

payment of his bill of costs out of the wife's separate estate. It did not appear that the wife had, either in writing or verbally, charged her separate property, or expressly contracted or promised to pay the debt out of her separate estate or otherwise. It was held by Sir J. L. Knight Bruce, V. C., that the separate estate was not directly liable. "The question is not before me," said his Honor, "whether the trustees are personally liable; or whether, if the trustees paid the solicitor's bill of costs, they would be entitled to retain the amount out of the rents and profits to which the lady was entitled for her separate use. The question before me is, whether the solicitor, in respect of this most just demand against some persons or person, has a direct right to resort to the separate property. . . . The case against the separate property is put upon the *implied contract*, supposed to arise from the nature of the business done, because it has been done mainly in respect of the separate estate. . . . In my judgment, the mere circumstance of the business being done relating to the separate property of a married woman, vested in trustees, is insufficient to make that separate property directly liable to the attorney for expenses incurred with reference to it. The trustees may be liable, or some other person may be liable; but it does not appear to me to follow, that the separate property of the wife is directly liable, or that she is liable in respect of the property." This class of cases, however, seems scarcely reconcilable with the opinions expressed by Lord Brougham in *Murray v. Barlee*, and by Lord Cottenham in *Owens v. Dickenson*.

In a recent case, moreover, a learned judge, whose exposition of the law relating to separate property deserves an attentive perusal, observes, that "it has not yet, indeed, been made the subject of positive decision that the principle of courts of equity, by which a married woman is constituted a feme sole as to her separate property, embraces her verbal engagements, or cases of common assumpsit; and in the seventh edition of Lord St. Leonards's work on 'Powers,' published in 1845, (1 Sugd. Pow. 206,) his Lordship observes, [*411] (though without referring *to *Murray v. Barlee*, or *Owens v. Dickenson*,) that the prevailing opinion then was, that her separate estate was not liable to general demands upon her. Considering, however, the opinions I have referred to, and the reason of the thing, I think it very probable, that when that question arises for decision, it will be decided in the affirmative." Per Sir R. T. Kindersley, V. C., in *Vaughan v. Vanderstegen*, 2 Drew. 183.

Although the husband have no property out of which to pay his own debts, or to maintain himself or his family by his wife, he will not be able to claim any contribution for such purposes out of the separate estate of his wife, even if she may have eloped from him. See *Hodgens v. Hodgens*, 4 C. & F. 323, 373, where Lord Cottenham, C., observed: "The children may want the necessaries of life, they may want the proper means of education; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children." See S. C., Ll. & G. t. Sugd. 299; Ll. & G. t. Plunk. 137, 148; 11 Bligh, N. S. 62; and see *Lumb v. Milnes*, 5 Ves. 520.

Where, however, a married woman, having separate property, is a lunatic,

an allowance will be made to the husband for the extraordinary expenses occasioned by her malady, if he be in poor circumstances and unable to meet them, (*Edwards v. Abrey*, 2 Ph. 37.) And though the Court might not reimburse the husband for what he had actually paid for her maintenance, (*Ib.* 38,) the case might be different where money was still due to parties who had the care of her, (*Ib.* 38; and see *Brodie v. Barry*, 2 V. & B. 36.) And even if the husband were of ability to maintain his wife under such circumstances, the Court might expend part of her separate income for such purposes; "for," said a learned judge, "if a commission was taken out, I must look at the substantial benefit of the object of it, and must consider the extent not only of the husband's means, but of his obligation to maintain her; and if the law would not compel him to contribute to her comfort in the degree in which he ought, I should not scruple to direct the committee to apply a part of her separate income:" *Brodie v. Barry*, 2 V. & B. 39. See also *Nettleship v. Nettleship*, 10 Sim. 236.

And where the husband has paid off a mortgage upon the separate estate of his wife, he can charge it to the extent of the mortgage: *Nelson v. Booth*, 5 W. R. 722.

Of the receipt by the husband of the separate property of wife.—Where property is settled to the separate use of a married woman, it is clear that if she expressly authorizes the money to be paid to *her husband, he is entitled to receive it, and she can never recall it, (Per Lord Cotten- [*412] ham, C., in *Caton v. Rideout*, 1 Mac. & G. 601;) and it seems also to be now well established, that where a wife tacitly permits, as well as where she expressly authorizes, her husband to receive the *income* of her separate property, especially if the husband continues to receive it for a great number of years, and it is applied for the benefit of the family, she cannot claim any reimbursement out of his estate: *Christmas v. Christmas*, Sel. Ch. Ca. 20; *Powell v. Hankey*, 2 P. Wms. 82; *Pawlet v. Delaval*, 2 Ves. 663; *Squire v. Dean*, 4 Bro. C. C. 326; *Milnes v. Busk*, 2 Ves. jun. 488; *Smith v. Camelford*, 2 Ves. jun. 698, 716; *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Bartlett v. Gillard*, 3 Russ. 149; *Carter v. Anderson*, 3 Sim. 370; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; *Rowley v. Unwin*, 2 K. & J. 138; *Corballis v. Grainger*, 4 Ir. Ch. Rep. 173; and see *Caton v. Rideout*, 1 Mac. & G. 529; where Lord Cottenham, C., held that the fact that the husband, who, with his wife's concurrence, received the income of her separate estate, was one of the trustees, was immaterial, as it appeared upon the evidence that payment was made to the husband as husband, and not as trustee. "Having," said his Lordship, "come to this conclusion upon the evidence, the result is that the rule, that separate money of the wife paid to the husband with her concurrence, or by her direct authority, must be applied to the present case." In commenting upon the inconvenience of not following the rule, he added: "If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred, separate property, which is introduced as a protection to the wife, does not take effect; all things going right, and no distinction being made, the question of separate property does

not arise; the property is used as a common fund for the benefit of the family, and, in that way, naturally falls under the control and management of the husband. If, however, it be once assumed that the wife by herself, or by those who represent her, may call upon the estate of the husband, or the husband himself, to repay the money, so far as they can trace it, it is impossible to tell what confusion might not be introduced into a family; for the wife might say that certain stock had been bought with her property, even where there was positive proof of an appointment by her in favor of her husband. The practice between the husband and wife is proper evidence to show acquiescence and concurrence."

In some cases, however, the husband has been obliged to account for one year's receipts: see cases cited in note to *Ex parte Elder*, 2 Madd. 286; and [*413] **Howard v. Digby*, 2 C. & F. 643; 8 Bligh, N. S. 224, and the comments upon it, Sugd. Prop. 162; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 513; *Lea v. Grundy*, 1 Jur. N. S. 953.

But where the wife has neither expressly, nor by tacit acquiescence, authorized her husband to receive the income, she will be entitled to reimbursement out of his estate, (*Parker v. Brooke*, 9 Ves. 583;) but where the consent of the wife to her husband receiving the income of her separate estate could not be presumed, on account of her lunacy, an allowance was made to the husband of a proper sum, for what he had expended in her support: *Attorney-General v. Parnter*, 3 Bro. C. C. 441.

So, likewise, when the husband has received, with the consent of his wife, the capital or savings of her separate property, but it is shown that he received them for her use, he is liable to an account. Thus, in *Darkin v. Darkin*, 1 J. Beav. 578, two promissory notes and a gas share were left to a feme sole for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband. Since, however, it appeared from a book of account kept by the husband, that he had received the dividends and interest for the use of the wife, it was held by Sir John Romilly, M. R., that after the husband's death they belonged to his wife as her separate estate. "The two promissory notes and the gas shares," said his Honor, "were her separate property. They were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton v. Rideout*, it might be inferred that the wife knew of the manner in which they were to be applied, and had agreed that the husband should receive them for his own use and benefit. But this objection is met by the production of the book of account, in the hand-writing of the husband, who acknowledges that the dividends and interest were received for the benefit of his wife; and, in 1841, the wife signs the book as having received the dividends herself. In this state of the case, it appears to me that I must consider the book evidence. And although the dividends were received by the husband with the sanction of his wife, yet that they were received for her. There is evidence of a trust in writing, and it is, therefore, unnecessary to resort to the principle laid down in *Rich v. Cockell*, (9 Ves. 369,) that the burthen of proof in such a case lies on the husband."

And the savings of the wife not given by her to the husband, may be followed *if invested in his name* in real estate. Thus, in *Darkin v. Darkin*, 17 Beav. 578, the savings of a wife's separate estate were invested in the joint names of the husband and wife. Afterwards the fund was applied *in [*414] the purchase of real estate, which was conveyed to her husband absolutely to uses to bar dower. After the death of the husband, it being established, by the evidence that the husband was to enjoy the property for life, and that it should afterwards belong to the survivor, it was held by Sir John Romilly, M. R., that the devisee of the estate was a trustee for the wife. See *Rowe v. Rowe*, 2 De G. & Sm. 294; *Barrack v. M^cCulloch*, 3 K. & J. 110; and see and consider *Hughes v. Wells*, 9 Hare, 749.

Where the evidence of a married woman, a plaintiff in a suit, seeking to make her husband account for part of her separate estate received by him, was tendered in support of her case against her husband, it was held by Sir J. Parker, V. C., that the 14th & 15th Vict. c. 94, did not take away the incapacity to give evidence between the husband and wife, and the evidence was rejected. For the same reason, the evidence of the husband, a defendant against his wife, was rejected: *Alcock v. Alcock*, 5 De G. & Sm. 671.

As to the relief afforded against a married woman having separate estate in respect of her contracts, &c.—The court can make no personal decree against a married woman, but can affect her separate estate only: *Francis v. Wigzell*, 1 Madd. 264.

The extent of the relief afforded by equity against the separate estate of a feme covert cannot be more correctly laid down than by Lord Thurlow, in *Hulme v. Tenant*. “Determined cases,” observes his Lordship, “seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate*, and *rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife; and the manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice, or of the engagement of the wife, to be carried into execution. . . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that *general engagement* on the part of the wife.” See, also, *Standford v. Marshall*, 2 Atk. 68; *Murray v. Barlee*, 4 Sim. 82; S. C., 3 My. & K. 209; *Field v. Sowle*, 4 Russ. 112; *Nantes v. Corrock*, 9 Ves. 189; *Bullpin v. Clarke*, 17 Ves. 365; *Jones v. Harris*, 9 Ves. 492, *493, 497; *Stuart v. Lord Kirkwall*, 3 [*415] Madd. 387; *Aylett v. Ashton*, 1 My. & Cr. 105, 112; *Francis v.*

Wigzell, 1 Madd. 258. In *Nantes v. Corrock*, 9 Ves. 189, Lord Eldon refused to hold stock of a feme covert bound, upon the ground, that stock was not liable to execution. See, however, now, 1 & 2 Vict. c. 110, s. 11, which renders stock liable to execution.

Where there is a clause against anticipation, attached to a trust for the separate use of a married woman, if she incurs a debt, as, for instance, by giving a promissory note, the creditor will not have a right to be paid, save out of the arrears of interest actually due on the separate estate, when the debt was contracted : *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328, 330.

It may here be remarked, that although a court of equity can only affect by its decree the *separate property* of a married woman, courts of common law, who, to a certain extent, recognize this species of property, go much further; for where the husband and wife are taken in execution, if there is no collusion between the husband and the plaintiff, the wife will be detained if she have separate estate; but if she have no separate estate she will ordinarily be discharged : *Sparkes v. Bell*, 8 B. & C. 1; *Newton v. Roe*, 7 Man. & Gr. 329; *Evans v. Chester*, 2 M. & W. 847; *Evans v. Morgan*, 2 Cr. & Jer. 453; *Larkin v. Marshall*, 4 Exch. 806; *Edwards v. Martyn*, 17 Q. B. 693, 700; *Ivens v. Butler*, 3 Jur. N. S. 394; 26 L. J. N. S., Q. B. 145.

A bill filed against a feme covert, in order to affect her separate estate, will not be defeated by the subsequent death of her husband, although the separate use then ceases; (*Field v. Sowle*, 4 Russ. 112;) and it may be filed after his death : *Heatley v. Thomas*, 15 Ves. 596; *Kenge v. Delavall*, 1 Vern. 326.

After the death of a feme covert, having separate property, creditors may file a bill for payment of their debts; (*Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90;) and her specialty debts, as debts by bond, will not have priority over her simple contract debts, but must both be paid *pari passu* : *Anon.*, 18 Ves. 258; *Owens v. Dickenson*, 1 Cr. & Ph. 53; in other respects, if she has left a will, her estate will be administered according to the ordinary rules in creditors' suits; *Owens v. Dickenson*, 1 Cr. & Ph. 56; *Norton v. Turvill*, 2 P. Wms. 144.

The separate estate of a married woman is liable for a breach of trust by her; but an administrator, *ad litem*, will not sufficiently represent her estate in order that the Court may determine the extent of her liability; *Shipton v. Rawlins*, 4 De G. & Sm. 477. See and consider *Mara v. Manning*, 2 J. & L. 311.

[*416] Although ordinarily the husband *is liable to the funeral expenses of the wife, even if she have separate estate, she may, by a charge in her will, relieve her husband out of the separate estate, and, in effect, make a present to him of what her funeral expenses would have cost him : *Willeter v. Dobie*, 2 K. & J. 647, 649; see *Gregory v. Lockyer*, 6 Madd. 90; *Jenkins v. Tucker*, 1 H. Black. 90.

Separate estate undisposed of by married women.—The undisposed of personal estate of a feme covert not required to meet her debts and engagements, will belong to her husband *jure mariti*, if in possession. See *Molony v. Kennedy*, 10 Sim. 254, where Sir J. Shadwell, V. C., held that cash and bank notes arising from property settled to the separate use of a married woman, belonged to her husband in his marital right. See also, *Johnstone v. Lumb*, 15 Sim. 308; *Tugman v. Hopkins*, 4 Man. & Gr. 389; *Drury v. Scott*, 4 Y. & C. 264; *Bird v. Peagram*, 13 C. B. 639; and choses in action, as moneys

in the funds, settled to the separate use of a married woman, will belong to the husband as her administrator : *Proudley v. Fielder*, 2 My. & K. 57; *Musters v. Wright*, 2 De G. & Sm. 777.

Savings and arrears of separate estate.—It may here be noticed that a married woman has the same power over the savings arising from her separate property as over property settled to her separate use; (*Gore v. Knight*, 2 Vern. 535; *Gold v. Rutland*, 1 Eq. Ca. Ab. 346, pl. 18; *Fettiplace v. Gorges*, 1 Ves. jun. 46; 3 Bro. C. C. 8; *Cecil v. Juxon*, 1 Atk. 278;) so likewise the wife will have the benefit of any outlay by her husband upon real estate, settled to her separate use; if, for instance, he builds houses upon it with his own money, the houses so built will become the wife's, and her interest in them will be to her separate use: *Barrack v. McCulloch*, 3 K. & J. 110, 124.

Arrears of separate estate in the hands of trustees, due at the time of a second marriage, will be considered as retaining their original character; *Ashton v. McDougall*, 5 Beav. 56;) but not, it seems, where the trustees have discharged themselves of the trust by paying them to the lady, or her order, or by her direction, during her widowhood, for then such arrears cease to be separate property; and, upon a second marriage, her husband will become entitled thereto: *Spicer v. Dawson*, 5 W. R. 431, M. R.

Aid afforded by equity to protect and recover the separate property of a married woman.—Where property is settled to the separate use of a married woman, she will be protected in the enjoyment of it by courts of equity; and her husband, or his creditors, will, if necessary, be restrained by injunction from interfering with it. Thus, *in *Green v. Green*, 5 Hare, [*417] 400, (n.), a wife, upon a bill filed by her against her husband, obtained an injunction, restraining him from taking proceedings to recover or receive the rents and profits of the trust property, (leaseholds,) or otherwise intermeddling or interfering with the trust estates, furniture, and effects, and from continuing in possession of a certain house, (in which the husband and wife had resided.) Upon a motion by the husband to dissolve the injunction, it was argued for the husband, that the injunction restraining the husband from continuing in possession of the house in which the wife resided, and from interfering with the furniture, operated as a divorce a mensa et thoro, Sir L. Shadwell, V. C., however, refused the motion with costs, observing, that “if the injunction had the effect attributed to it,—a question which he could not determine,—the husband would not be without his remedy in the Ecclesiastical Court. So, likewise, in *Newlands v. Paynter*, 4 My. & Cr. 408, a married woman being entitled under a will to leaseholds and furniture to her separate use without the intervention of a trustee, they were seized in execution by a judgment creditor of her husband, Lord Cottenham, however, restrained the sale of them by the sheriff, and there being a dispute as to whether the whole of the property passed by will, and as to whether part of the property had not been purchased by the wife out of the savings of her separate estate, (in which case it would be equally entitled to protection,) his Lordship directed inquiries to ascertain the facts.

So where a married woman to whom a sum of money was payable for her

separate use, received a check from the Accountant-General, and handed it over to her solicitor, who accompanied her; the solicitor was, on motion, ordered by Sir John Romilly, M. R., to pay the balance to his client; and it was held that the onus being upon the solicitor to show cause for not paying it at once, he could not set up a voluntary agreement to pay a debt due to him from her husband out of it. "An arrangement," said his Honor, "of this sort would not be of the slightest avail. It is an agreement with a married woman who was entitled to receive a sum of money for her separate use, without any professional advice except her personal solicitor, and without any consideration whatever, to pay debts due from her husband, in respect of which she was under no species of liability; and it is clear to me, that the arrangement cannot afford a sufficient reason why her solicitor should not pay over a sum ordered to be paid to her separate use, and which he, accompanying her to the Accountant-General's office, received as her solicitor for that purpose. His duty, when he received the money, was to pay it to *her, and not to carry it over in his own books to the account of her husband: *Mawhood v. Milbanke*, 15 Beav. 36.

Where a husband, by forgery, endorsed his wife's name upon a bill of exchange of the Bank of Australia, made payable to her, and absconded with the money, it was held by Sir John Romilly, M. R., that the fact of the bill of exchange being payable to a married woman was sufficient notice that it related to her separate estate, and his Honor granted an injunction to restrain the endorsee from proceeding at law, or parting with the bill, and ordered the bank to pay the money to the wife on her sole receipt, and the husband to bring the amount into Court when he should come within the jurisdiction: *Dawson v. Prince*, 5 W. R. 813, M. R.; [overruled by the Lords Justices, 6 W. R. 171.]

It seems that a married woman cannot sue alone in equity for an injunction to restrain a mere personal nuisance, although she alleges that the value of property to which she is entitled to her separate use is thereby depreciated in value; for if the nuisance were merely personal, then it is doubtful whether the wife alone, or by her next friend, could sue without the husband, and injury to her property is not of itself a nuisance: *White v. Cohen*, 1 Drew. 312.

When the wife assigns her separate property to secure the debt of her husband, she is entitled as between herself and her husband, and his assignee, under the Insolvent Debtors' Act, to have his property comprised in the same security first applied in payment of the debt: *Aguilar v. Aguilar*, 5 Madd. 414.

What words will create a separate use.—No particular form of words is necessary in order to vest property in a married woman to her separate use; but the intention to give her such an interest in opposition to the legal rights of her husband, must be clear and unequivocal: *Stanton v. Hall*, 2 Russ. & My. 180. The marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or her trustees, for her "sole and separate use:" *Parker v. Brooke*, 9 Ves. 583; and see *Hulme v. Tenant*; or,

"sole use, benefit and disposition:" *Ex parte Ray*, 1 Madd. 199; or, "sole use and benefit:" — *v. Lyne*, You. Exch. Ca. 562; "full and sole use:" *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; "for her own use and at her own disposal:" *Prichard v. Ames*, 1 T. & R. 222; *Inglefield v. Coghlan*, 2 Coll. 247; "for her own use, independent of her husband:" *Wagstaff v. Smith*, 9 Ves. 520; "for her own use and benefit, independent of any other person:" *Margetts v. Barringer*, 7 Sim. 482; *Glover v. Hall*, 16 Sim. 568; "for her livelihood:" *Darley v. Darley*, 3 Atk. 399. And see *Cape v. Cape*, 2 Y. & C. Ex. Ca. 543; but see *Lee v. Prieaux*, 3 Bro. C. C. 383; **Wardle* [*419] *v. Claxton*, 9 Sim. 324; or, "that she should receive and enjoy the issue and profits:" *Tyrell v. Hope*, 2 Atk. 558. So where, as in *Hulme v. Tenant*, there is a direction that "the interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand;" or, "her receipt to be a sufficient discharge:" *Lee v. Prieaux*, 3 Bro. C. C. 381; *Stanton v. Hall*, 2 Russ. & My. 180; or, "to be delivered to her on demand:" *Dixon v. Olmius*, 2 Cox, 414.

And words apparently confining the operation of the separate use clause to members of a class married at the death of the testator, may, by the context, be extended so as to include those married subsequently. Thus, where a testatrix directed "that the legacies and shares of such of my nieces as are married shall be to their separate use, free from the debts and control of any husband; and, that my trustees shall have power to give effect to this my intent," it was held by Sir L. Shadwell, V. C., that the testatrix had used the words in a future sense, and that she intended those of her nieces who married after her death, as well as those who were married at that time, should take to their separate use: *In re Bayliss's Trusts*, 17 Sim. 178.

Where a testator, after giving his residuary property to two nieces, added, "I confine my said legacies hereinbefore mentioned, to be given to my nieces and their children, without comprehending their husbands, unless they, my said nieces, or either of them, should die without issue; Sir John Romilly, M. R., was of opinion that the only way to give effect to these words was to give the residue between the nieces equally for their separate use for life, and after their deaths to their children, and if they had no children, then it would belong to the nieces absolutely:" *Dawson v. Bourne*, 16 Beav. 29.

A bequest of the interest of a fund to a woman to her separate use, will give to her the capital also to her separate use. Thus, where a testator gave the interest of a capital sum of £1000 to his wife for her sole use and benefit, and free from the debts and control of any husband she might marry, and directed that her receipt alone should be a sufficient discharge to his executor, it was held by Lord Cranworth, V. C., that the gift of the interest of £1000 passed the capital to the widow, and that she was entitled to it to her separate use: *Humphrey v. Humphrey*, 1 Sim. N. S. 536.

As to the exclusion of the marital right by a French settlement, see *Este v. Smythe*, 18 Beav. 112.

But it has been held that no separate use has been created where there is a mere direction "to pay to a married woman and her assigns:" *Dakins v.*

Berisford, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517; or there is [*420] a gift "to her use:" *Jacobs v. Amyatt*, 1 Madd. 376, n.; "to her own use and benefit:" *Johnes v. Lockhart*, cited 3 Bro. C. C. 383, n.; *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491; *Kensington v. Dollond*, 2 My. & K. 184; *Beales v. Spencer*, 2 Y. & C. C. C. 651; to her "absolute use:" *Ex parte Abbott*, 1 Deac. 338; or when a payment is directed to be made "into her own proper hands, to and for her own use and benefit:" *Tyler v. Lake*, 4 Sim. 144; S. C., 2 Russ. & My. 183; into her proper hands, "to her own proper use and benefit:" *Blacklow v. Laws*, 2 Hare, 49; but see *Hartley v. Hurle*, 5 Ves. 545; or when property is "to be under her sole control:" *Massey v. Parker*, 2 My. & K. 674. So, a bequest to a woman and her assigns for her life, "for her and their own absolute use and benefit," does not confer upon her a separate estate: *Rycroft v. Christie*, 3 Beav. 238.

And where a testator gave £1000 to his sister for her, or for her children's sole use and benefit for ever, and directed his executors to pay the same to her as soon as possible, it was held that the sister did not take the £1000 to her separate use: *Chipchase v. Simpson*, 16 Sim. 485.

As to restraint upon alienation.—When once it was established that the separate property of a married woman must be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole, it was found that, to secure her the desired protection against the influence and control of her husband, which, if exercised, would in all probability be destructive of her estate, it was necessary to insert in settlements and wills a clause restraining the wife from anticipating or alienating her separate property. This clause was first inserted in *Miss Watson's settlement*, by the advice of Lord Thurlow, who was a trustee, (*Pybus v. Smith*, 3 Bro. C. C. 347; *Parkes v. White*, 11 Ves. 221; *Jackson v. Hobhouse*, 2 Mer. 487; and see the remarks of Lord Cottenham in *Rennie v. Ritchie*, 12 C. & F. 234;) and it is valid, annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or for life only: *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627.

As the separate use, and the restraint upon alienation, which is a modification of it, are creatures of equity, called into existence merely for the purpose of securing to the wife the enjoyment of her own property free from marital rights and influence, they cease to exist when they are unnecessary for that purpose; thus, property given to the separate use of a woman, although subject to restraint upon anticipation, may be [*421] *aliened by her at any time when she is discovert: *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 377.

It was, indeed, at one time, supposed, that the separate use, with the restraint upon anticipation, was only effectual during a coverture in existence at the time of the gift, and did not extend to a subsequent coverture: *Newton v. Reid*, 4 Sim. 141; *Brown v. Pocock*, 5 Sim. 663; *Woodmeeston v. Walker*, 2 Russ. & My. 207; but it is now clearly settled by the leading case of *Tullett v. Armstrong*, 1 Beav. 1, that although the separate estate, whether modified

by restraint or not, is suspended while a woman is discovert, it is capable of arising upon the happening of any marriage. In that case, a testator gave property to trustees, in trust for his wife for life, with remainder to M. A. T., then a feme sole, for life, in such manner that it should not be anticipated, and that no husband should acquire any control over it. M. A. T. was unmarried at the death of the testator, but she married in the lifetime of the widow. It was held, by Lord Langdale, M. R., whose learned and elaborate judgment has settled the law upon a satisfactory basis, that both the separate use clause, and the restriction against alienation, became effectual on her marriage; and his Lordship laid down the following rules as deduced from the authorities:—

“That property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert.

“That, in respect of such separate estates, she is, by the Court, considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection.

“The words ‘independent of a husband,’ whether expressed or implied in the terms of the gift, mean no more than that this Court will not permit the marital power of the husband to be used, in contravention of the enjoyment of the property, according to the terms of the gift.

“If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

“If the gift be made to her sole and separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate, independent of her husband.

“In either of these cases she has, when discovert, a power of alienation; the restraint is annexed *to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is [*422] discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

“The restriction cannot be considered distinctly from the separate estate, of which it is only a modification. To say that the restriction exists, is saying no more than that the separate estate is so modified. The donor, in giving the woman, when married, some of the faculties of a feme sole, has withheld the power of alienation, under the terms of the gift; and, by the aid of this Court, the woman is a feme sole, as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does exist, without the restriction, but the restriction has no independent ex-

istence; when found, it is as a modification of the separate estate, and inseparable from it."

The decision of Lord Langdale was affirmed by Lord Cottenham, who observed, that after the most anxious consideration, he had come to the conclusion, that the jurisdiction which the Court had assumed in similar cases, justified it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it, throughout a subsequent coverture, and resting such jurisdiction upon the broadest foundation, and that the interests of society required that this should be done. When the Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation: 4 My. & Cr. 405.

A trust for the separate use of a woman may be confined to a particular coverture: *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149; *In re Gaffee's Settlement*, 1 Mac. & G. 545; *Moore v. Morris*, 3 Jur. N. S. 552.

[*423] *What words will restrain alienation.*—As in the case of the separate *use, no particular form of words is necessary to restrain alienation, but the intention must be clear. Thus, where there was a direction to pay dividends to such persons and in such manner and form as the wife should, from time to time during her life, notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment, into her proper hands for her separate use, and, after her death, to her husband; upon a bill being filed by the husband and wife, it was held, there was no restraint upon alienation by the wife, and a transfer of the fund was, with the consent of the wife, made to the husband: *Clarke v. Pistor*, cited 3 Bro. C. C. 568; *Pybus v. Smith*, 1 Ves. jun. 189; S. C., 3 Bro. C. C. 340; *Witts v. Dawkins*, 12 Ves. 501; *Brown v. Like*, 14 Ves. 302; *Sturgis v. Corp*, 13 Ves. 190; [and these decisions were followed in the recent case of *Cooke v. Husbands*, 11 Maryland, 492, 503.] In the case of *Hovey v. Blakeman*, 9 Ves. 524, where there was a trust to pay rents, dividends, and profits, "into the respective proper hands of the testator's two sisters, so long as they should live, the same to be to their separate use," Sir William Grant, M. R., thought, as it was expressed, that an absolute property was not intended to be given to them, so as to give a power of disposition; that it was a personal bequest to them, to be paid into their respective proper hands, without a power of disposition; and he dismissed a petition of an annuitant under a grant from one of them, leaving her to file a bill, but intimating an opinion against it. The authority of *Hovey v. Blakeman* is at least doubtful, if it is not to be considered as overruled; for, where expressions giving the wife a right to receive property "with her own hands," or, "with her own hands from time to time,"

or where equivalent expressions are made use of, they are, to use the words of Lord Eldon, "only an unfolding of all that is implied in a gift to the separate use." See *Parkes v. White*, 11 Ves. 222; *Acton v. White*, 1 S. & S. 429.

So where a testator having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it "*should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest of it to be given to her, on her personal appearance and receipt*" by the banker the trustee might appoint; it was held by Lord Cranworth, V. C., that the wife was not prohibited from alienating her interest in the stock; *Ross's Trust*, 1 Sim. N. S. 196. See also *Wagstaff v. Smith*, 9 Ves. 520, 524. See and consider *Scott v. Davis*, 4 My. & Cr. 87, 89.

Although a bequest of stock for a married woman, for her separate use for life and after her decease, for her appointees, directs that, "in case any appointment should *be made by deed, the same should not come into [*424] operation until after her death," the married woman is not thereby restrained from anticipation, nor prevented from appointing the fund by an irrevocable deed: *Alexander v. Young*, 6 Hare, 393.

In a recent case, (*In re Young's Settlement*, 18 Beav. 199,) a testator after bequeathing one-third of his residue to his daughter absolutely, to be vested at twenty-one, but not to be payable until twenty-five, declared that the beneficial interest thereby intended for his daughter should be for her separate use, independent of any husband she might marry, "but should devolve and be settled by deed in writing, upon her, in such manner as if she were a feme sole and unmarried, and her interest in the said interest, dividends, and produce, should only be paid, as the same should respectively become and accrue due, and should not be anticipated by any deed or instrument whatsoever; and that in the meantime, and until his daughter should be married, she should only be entitled to receive and take her dividends, interest, and produce, and retain the power to give and bequeath the capital or principal fund by her last will and testament, and which power he thereby conferred upon her." The daughter being unmarried it was held by Sir John Romilly, M. R., that the daughter took absolutely, and was entitled to payment of the fund out of Court, on attaining twenty-one.

But where there was a declaration that the receipt of the wife, or any person to whom she should appoint the income of property, *after the same should become due*, should be a valid discharge, it was held that she was restrained from alienation: *Field v. Evans*, 15 Sim. 375: but see the comments on this case in *Baker v. Bradley*, 2 Sm. & G. 531, 561; *Doolan v. Blake*, 3 Ir. Ch. Rep. 340. So, where property is given to the separate use of a married woman, "not to be sold or mortgaged," she will take, with a restraint upon alienation: *Steedman v. Poole*, 6 Hare, 193. Where, as in *Miss Watson's case*, there is a gift or settlement of property to the separate use of a married woman, and it is expressed to be without power of anticipation, it is clear that alienation by her is restrained. See *Parkes v. White*, 11 Ves. 221; *Sockett v. Wray*, 4 Bro. C. C. 483; *Jackson v. Hobhouse*, 2 Mer. 487. [And it would

seem that although the intention to restrain must be plain in order to be effectual, it may be deduced by implication from the whole or any part of the instrument, and need not be set forth in express words or by a specific clause or provision : *Weeks v. Segs*, 9 Georgia, 201.]

Where, according to a form at one time not unusual amongst conveyancers, the income of a fund was payable to such persons as a married woman should by writing, but not by way of anticipation, appoint, and in default of appointment there was a gift of it to her separate use, it was held by Sir L. Shadwell, V. C., that since the clause restraining anticipation was not expressly extended to the *gift as well as to the power, she might execute a valid assignment of the income, (*Brown v. Bamford*, 11 Sim. 127 ; 12 Sim. 616 ; and see *Barrymore v. Ellis*, 8 Sim. 1 ;) and in another case his Honor held, that unless the clause restraining anticipation was expressly extended to the power, she might execute a valid appointment : *Medley v. Horton*, 14 Sim. 222. However, in *Brown v. Bamford*, 1 Ph. 620, Lord Lyndhurst, although at first he expressed an opinion in accordance with that of the Vice-Chancellor, ultimately, upon a re-argument, overruled it ; saying that the restriction against alienation extended to the whole gift : that such was the true construction of the bequest, and that it corresponded with what appeared to have been the manifest intention of the testator. See, also, *Harnett v. Macdougall*, 8 Beav. 187 ; *Moore v. Moore*, 1 Coll. 54 ; and in *Baggett v. Meux*, 1 Coll. 138, a testator devised real estate to his daughter, a married woman, in fee, but with a declaration *that she should not sell, charge, mortgage, or encumber it*, followed by another declaration, that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband, and free from his control or intermeddling. It was held by Sir J. L. K. Bruce, V. C., that the restraining clause was not void, inasmuch as it must be taken in connection, as well with the succeeding as the preceding words ; and therefore, that a security, by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife. This decision, which was affirmed, 1 Ph. 627, must be considered as overruling *Medley v. Horton*, 14 Sim. 222.

It is not at all necessary that negative words should be introduced in the receipt clause, to complete the restraint upon alienation, for the clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. See *Harrop v. Howard*, 3 Hare, 624 ; *Brown v. Bamford*, 1 Ph. 626.

Restraint on alienation cannot be dispensed with by Court.—Where there is attached to the separate use of a married woman a clause against anticipation, the Court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so. Thus where a testator gave a married woman a legacy upon condition that she conveyed within twelve months, her separate estate, which was subject to a restraint against anticipation, to certain persons, it was held by Sir John Romilly, M. R., that effect could not be given to the bequest, though highly beneficial

to the married *woman. "It is said," observed his Honor, "that [*426] these cases of separate uses and restraints are mere creatures of equity, and that therefore a court of equity may deal with them as it thinks right. It is, no doubt, true that they have arisen from the doctrines laid down by the judges who have presided in courts of equity; but so have all trusts, and it does not therefore follow that this Court can dispense with or mould this fetter as and when it thinks fit. I entirely concur in the argument, that if the Court could, on the present occasion, dispense with it, because it is for the interest of the married woman, it might and would in like manner be dispensed with, if a person offered to give her three times the value of the property to settle it on the same trusts, provided she conveyed her separate and unalienable interest in the property. But I am of opinion that she could not so convey it: the first testator has thought fit to impose certain fetters on his property, which are sanctioned by the law of England, and which it permits the testator to impose; those fetters remain and make the property in the hands of the devisee or legatee absolutely inalienable for any consideration whatever:" *Robinson v. Wheelwright*, 21 Beav. 214. This decision was afterwards affirmed by the full Court of Appeal: see 6 De G., Mac. & G. 535.

It seems that the clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence: *Derbishire v. Home*, 3 De G., Mac. & G. 80.

Extension of the Equitable Doctrine of Separate Use, by 20 & 21 Vict. c. 85.]—It may here be noticed, that under the act to amend the law relating to Divorce and Matrimonial Causes in England, (20 & 21 Vict. c. 85,) it is enacted that—"A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the court, (for divorce and matrimonial cases,) for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and *property shall belong to the wife as if she [*427] were a feme sole. Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: provided also, that if the husband or any creditor of, or person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the

wife, (which she is hereby empowered to bring,) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid : if any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation." Sect. 21.

Moreover, "In every case of a *judicial separation* the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to *property* of every description which she may acquire, or which may come to or devolve upon her ; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease, the same shall in case she shall die intestate, go as the same would have gone if her husband had been then dead ; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate." Sect. 25.

"In every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding ; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant ; provided, that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use." Sect. 26.

The principle adopted by some of the courts of this country, in regard to the power of a *feme covert* over her separate estate, is in many respects, opposite to that which prevails in England. For, while the English cases hold that she is, in respect to her separate estate, to be regarded as a *feme sole*, with all the powers which belong to that character, and that her note or bond, or other obligation will bind her estate, the rule adopted in many of the American courts, is, that a married woman has no power in relation to her separate estate, but such

as has been expressly given to her, and that her note or bond will not charge her separate estate, except where a provision for that purpose is contained in the instrument creating the separate estate. As the point is one of some nicety, it will be necessary to review the decisions in the several States separately. The lead in departing from the English doctrine was taken by the Court of Appeals of South Carolina.

In *Ewing v. Smith*, 3 Dessaussure, 417, (1811,) in that State, Chancellor Dessaussure, upon a laborious re-

view of the English cases, considered the principle to be, that a *feme covert* having a separate estate, is to be held a *feme sole* to the extent of such property, unless expressly restricted; and he decided that the wife's separate estate was liable in equity upon a bond given by the husband and wife; but this was reversed in the Court of Appeals, by a majority of the Chancellors, and the rule declared, that a *feme covert* has no power with regard to her separate estate, but what has been expressly given to her by the instrument of settlement, and that any power so given must be strictly pursued. And this has ever since been the established principle in that State. A little doubt, indeed, was expressed in *Trustees of Frazier v. Center & Hall*, 1 M'Cord's Chancery, 270, 275, (1826,) but in *Magwood and Patterson v. Johnston and others*, 1 Hill's Chancery, 228, 230, (1833,) and in *Robinson v. Ex'rs of Dart*, Dudley's Equity, 128, 131, (1838,) it was declared by Harper, Ch., that since the decision in *Ewing v. Smith*, which had ever since been followed, there could be no doubt, in that State, that a *feme covert* has no power to dispose of, or in any manner charge, her separate estate, even with the consent of her husband and trustee; and in *Clark v. Makenna*, Cheves' Equity, 163, (1840,) this was admitted to be the rule, where the instrument does not expressly make her estate subject to her debts. And the same point has again been authoritatively and finally settled in the Court of Appeals, in *Reid v. Lamar*, 1 Strobhart's Equity, 27, 37, (1845,) where it was decided that an estate settled to the separate use of a *feme covert*, to be at her "full and free disposal," was yet

not chargeable upon a note given by her and her husband. Johnson, Ch., indeed, had decided that it was chargeable; but this was reversed by the concurrence of the three other Chancellors in the Court of Appeals, and the rule of *Ewing v. Smith*, re-affirmed with increased confidence. "If any thing can be considered as settled," said Harper, Ch., in delivering the opinion of the Court of Appeals, "it is the settled law of this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, incumber, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate; which power must be strictly pursued:—in contradiction to many English cases in which it has been held that she is a *feme sole*, with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law since the decision in *Ewing v. Smith*, followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it—though some *dicta* of judges were found, seeming to imply that they thought the subject might still be open to consideration. . . With respect to the decision in question, (in *Ewing v. Smith*), even those who dissent from it on the score of authority, acknowledge the wholesomeness of its operation, and its tendency to promote the objects which the Court of Equity had in view, in recognizing a separate property in *femes covert*, and in protecting them against the influence or practices of their hus-

bands; which might be exercised without the possibility of detection; and also to guard them against their own generous or devoted impulses. The judges who dissented from the opinion of the majority in *Ewing v. Smith*, afterwards acceded to it, and I am yet to learn that any inconvenience has followed to married women or their children—the objects of the court's protection. . . . Though it has sometimes been said in relation to our doctrine, that a married woman is only a *feme sole sub modo*, or to the extent that the settlement makes her so; yet these expressions are inaccurate. She can, in no manner of respect, be considered a *feme sole*. A *feme sole* disposes of, or charges, her property by her own act, and according to her own will, by her inherent power as owner. A *feme covert* exercises a *delegated* authority, and cannot exceed it. She is enabled to execute a power, as, in some instances, any third person—*feme covert* or other—even those having no interest in the property, might be enabled to execute it, and bind her by their act.” See, also, *Rochell v. Tompkins*, Ib. 114, 121. While, however, the principle is thus firmly settled in South Carolina, that the power of a married woman over her separate estate is derived from the instrument creating the estate, and that she has no other capacity to contract but as authorized or empowered by the settlement; it has been held, that if the deed of settlement expressly declare that the estate shall be liable for her own debts and contracts, it will be chargeable in equity for debts contracted by her expressly on her separate account; *Clark v. Makenna*, Cheeves' Equity, 163. But this is supposed to illus-

trate and enforce the general principle, and not to disturb it. “The case of *Clark v. Makenna*,” said Harper, Ch., in *Reid v. Lamar*, “rested on no authority of the wife to bind her property as a *feme sole*, but upon the terms of the instrument, by which the property was made liable to her ‘debts and contracts.’ This resulted from the power of the *grantor* over the property.” It is held, however, in South Carolina, to be a general rule in regard to trust estates, and applicable to a wife's separate trust, that a trust estate is liable in equity for debts incurred for its use and on its account, that is, for purposes for which it was intended that the trust estate should be appropriated; see *Cater v. Eveleigh*, 4 Dessaussure, 19; *James v. Mayrant*, Id. 591; *Montgomery v. Eveleigh and others*, 1 M'Cord's Chancery, 267, 269. But this liability is very strictly limited. It rests, solely, upon the equity that he who has advanced money, or given credit, to effect the objects of the trust, and has, therefore, accomplished, at his own expense, what the *cestui que trust* might and ought to have done out of the profits of the trust estate, has a right to be substituted in the place of the *cestui que trust*, or to be reimbursed out of the trust estate. Money will not be considered as expended for the benefit of a trust estate, within the scope of this equity, except where it has added value to the estate, or defrayed charges to which the trust estate would be liable. And the court will inquire into the necessity and propriety of the charge, and will not allow the wife to charge her estate by her own mere act or will, but will require evidence that the necessity existed, and that credit was given

specifically to the wife and her estate ; *Magwood and Patterson v. Johnston and others*, 1 Hill's Chancery, 228, 232, 234, 236 : see, also, *Clark v. Makenna*, Cheves' Equity, 163 ; *Reid v. Lamar*, 1 Strobhart's Equity, 27, 40 ; *Rochell v. Tompkins*, Id. 114, 121 ; *Adams v. Mackey*, 6 Richardson's Eq. 75.

In New York, the subject has undergone very able and profound discussion : and as, in South Carolina, the decision of the Chancellor, in the first of the cases, supporting the English rule, was reversed by the Court of Appeals, and that rule abolished ; so, in New York, the decision of the Chancellor, condemning and altering the English rule, was reversed in the Court of Errors, and that rule set up as the principle to be adopted. In the case of the *Methodist Episcopal Church v. Jaques*, 3 Johnson's Chancery, 78, (1817,) the English authorities were reviewed by Chancellor Kent, with an acute and searching criticism, and were shown to be too uncertain and unsatisfactory to be relied upon as affording a sure guidance. "I apprehend," he observes, "we may conclude that the English decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole*, to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole, sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power but what is specially given, and to be

exercised only in the mode prescribed, if any such there be. Her incapacity is general ; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which this court allows her to assume, or her friends to give, and it ought not to be rendered illusory. The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed ; when it permits her to appoint by deed, it cannot mean, that giving a bond, or a note, or a parol promise, without reference to the property, or making a parol gift, is such an appointment. So, when it says that she is to receive from her trustee the income of her property, as it, from time to time, may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement by withdrawing from the wife the protection it intended to give her. Perhaps, we may say, that if the instrument be silent as to the mode of exercising the power of appointment or disposition, it intended to leave it at large, to the discretion or necessities of the wife, and this is the most that can be inferred." On appeal to the Court of Errors, these fine observations were discredited by the common law judges,

and the decree of the chancellor, and the opinion upon which it was founded, were pronounced to be erroneous. Spencer, Ch. J., declared that the decisions fully established, "that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate;" and, "that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an engagement." And Platt, J., considered the rule to be, "That a *feme covert* having a separate estate is to be regarded as a *feme sole*, as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her; and her disposition of it will be sanctioned and enforced by a court of equity, without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any *particular mode* of exercising her disposing power, does not deprive her of any *other mode* of using that right, not expressly, or by necessary construction *negatived* in the devise or deed of settlement:" *Jacques v. The Methodist Episcopal Ch.*, 17 Johnson, 548, 578, 579, 585. The principle thus established by the Court of Errors, was

again recognized by the same tribunal in *Dyett v. N. A. Coal Co.*, 20 Wendell, 570, 573, where Mr. Justice Cowen, referring to their earlier decision, says, "Where the wife's separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest." Her power of disposition, by way of alienation, in such cases, has subsequently been spoken of, in New York, as general; *Powell v. Murray*, 2 Edwards, 636, 643; and said to extend to a disposition either by deed or will; 10 Barbour, 597; *Wadham v. The Society*, 2 Kernan, 415; *The Albany Insurance Company v. Bay*, 4 Comstock, 9; see, also, *Cruger v. Cruger*, 5 Barbour's S. Ct. 227, 268: but in regard to the power of charging the estate for debts, the decisions in the chancery courts, in that State, have still held back from the broad rule adopted in England, and tended strongly to the principle established in the South Carolina decisions, which have been referred to, and obviously approved. The rule laid down in the court of chancery has been, that the wife's separate estate is liable in equity for any debts contracted, by herself or her agent, for the benefit of that estate, or for her own benefit upon the credit of her separate estate; *North American Coal Co. v. Dyett*, 7 Paige, 9, 14; S. C., affirmed on error, 20 Wendell, 570; *Gardner v. Gardner*, 7 Paige, 112, 116; *Cumming & Pollock v. Williamson and others*, 1 Sandford, 17, 25; *Dickerman v. Abrahams*, 21

Barbour, 551; *Coon v. Brook*, Ib. 546; her disposing power being in the nature of a power of appointment, and some manifestation being necessary of her intention to appoint; *The Albany Fire Insurance Co. v. Bay*, 4 Comstock, 9. And it has been expressly determined, that where creditors do not claim under any charge or appointment made in pursuance of the instrument of settlement, they must show, that the debt was contracted, either *for the benefit of her separate estate*, or for her own benefit *upon the credit of the separate estate*; and that a *general debt* made by a married woman, having a separate estate, is not a charge upon that estate; and such estate is not chargeable upon any *implied* undertaking of hers; *Curtis v. Engel*, 2 Sand. 287, 289. And in that case, it was decided, that debts incurred for goods furnished to the business concern which had belonged to the wife, were not chargeable upon the trust estate, because it was not satisfactorily proved, that the goods were sold upon the credit of her property, or that those who furnished them relied upon it, *as being her separate property*. See *Knowles v. McCamly*, 10 Paige, 343, 346. In the late case of *Vanderheyden v. Malloy*, 3 Barbour, Ch. 10; 1 Comstock, 453, 462, it was said, that a *feme covert's* general personal engagement will not affect her separate property; but that, unless specially restrained by the instrument creating the separate interest, she may sell, pledge, or encumber that separate property, by any act or contract that shows an *intention* to affect it; and that any debt contracted by a married woman, for herself or her husband, is ordinarily taken to be *prima facie* evidence

to charge the separate estate; and the separate estate of a wife was accordingly held answerable in *Yale v. Dederer*, 21 Barb. 286, for a note which she had signed as surety for her husband. Recently, however, the revised statutes in relation to uses and trusts, have received a construction which limits the power of a married woman, in respect to separate trusts of real estate, more strictly than any one had before contended for. Under those provisions, it has been held, that not only cannot a *feme covert* dispose of, or charge her separate estate by anticipation in any manner, but that, as she cannot incur a personal debt; even the surplus income cannot be made liable for any obligation contracted by her after marriage, even for necessary repairs to the trust estate, without the authority of the trustee, and the trustee cannot charge the estate, except so far as he is authorized to do so by the terms of the trust: *L'Amoureux v. Van Rensselaer*, 1 Barbour's Chancery, 34, 37; *Rogers v. Ludlow*, 3 Sandford, 104, 108, 109; see *Wadham v. The Society*, 2 Kernan, 415.

[The power of a *feme covert* to charge or dispose of her separate property, is also recognized in Connecticut, Maryland, Alabama, Kentucky, North Carolina, Georgia, Missouri, and Florida; *Lewis v. Yale*, 4 Florida, 418; *Nixon v. Rore*, 12 Grattan, 425; *Ozly v. Ikellheimer*, 26 Alabama, 382; *Bell v. Kellar*, 13 B. Monroe, 381; *Lillard v. Turner*, 16 Id. 374; *Burch v. Brackenridge*, Ib. 482; *Whitesides v. Carman*, 23 Missouri, 457; *Segond v. Garland*, Ib. 547; *Cooke v. Husbands*, 11 Maryland, 492; *Imlay v. Huntington*, 20 Conn. 149; *Harris v. Harris*, 7 Iredell's Equity, 311; *Wylly v. Collins*, 9 Georgia, 223;

Roberts v. West, 15 Georgia, 123; although there is some difference of opinion, both as to the extent of the power itself, and the mode in which it must be exercised. In *Imlay v. Huntington*, a conveyance to the separate use of a married woman, was held to render the property conveyed as absolutely subject to her control as if she were sole, and to invest her with a general power of disposition, even when a specific power is conferred by the deed. A similar view has been taken in Alabama, and the control of a married woman over a gift to her use, said to result from the *jus disponendi*, which is one of the incidents of title or ownership, and not to partake of the nature of a power of appointment, or be subject to the rules by which the exercise of such powers is limited; *Ozly v. Ikelheimer*. And the recent English cases were cited with approbation, which tend to show that when a debt is in other respects such as to be a charge on the separate property of a married woman, it will make no matter whether the engagement, in which it originates is verbal or written, *ante*. In *Fears v. Brooks*, 12 Georgia, 195, a *feme covert* was said to be viewed as a *feme sole* in equity, so far as her separate property is in question, and consequently to have an absolute power of disposition, unless restrained or fettered by the instrument in which her estate originates; but in *Wylly v. Collins*, 9 Georgia, 223, the powers of a married woman were held to be limited, to those given by the deed or gift of the thing over which they are sought to be exercised, while in *Weeks v. Sego*, *Ib.* 201, the grant of a limited or special power, was said to preclude the donee from exer-

cising a power of a more general nature, and to limit her strictly to the path marked out by the donor. Nearly the same ground was taken in the recent case of *Cooke v. Husbands*, 11 Maryland, 492, and the grant of property to the separate use of a *feme covert*, said, *prima facie*, to confer a power of alienation which might, however, be restrained either by an express prohibition, or impliedly by designating a particular mode in which the power should be exercised. In Kentucky, a *feme covert* may charge personal property, held for her separate use, by any oral or written agreement which shows an express or implied intention so to charge it; *Lillard v. Turner*, 16 B. Monroe, 374; *Burch v. Breckenridge*, *Ib.* 482; *Bell v. Kellar*, 13 *Id.* 384; and the rule is the same when land is in question, except that the contract must then be in writing; *Burch v. Breckenridge*. Such an intention will be implied from the execution of notes, bonds, or other instruments of a like nature, by a married woman, which having no force, as personal obligations, can only be valid as a charge; *Bell v. Kellar*; *Burch v. Breckenridge*; or from any circumstances which show that she meant the burden to fall on her separate estate, and did not contract solely on the credit of her husband; *Burch v. Breckenridge*; but cannot be inferred from the mere fact that the debt was incurred, in the absence of proof that she intended to pledge her property for its payment; *Coleman v. Woolley*, 16 B. Monroe, 320. And as the charge owes its origin to her choice or election, it will not be carried beyond her intention, and will be limited to the issues and profits

of the property, unless it appears that she meant to pledge the whole absolutely; *Burch v. Breckenridge*.

The question was very fully examined in *Burch v. Breckenridge*, and the following language held by Simpson, J., in delivering the opinion of the court: "As a general rule, a married woman cannot, according to the common law, contract as a *feme sole*, nor as such, sue or be sued. That being the legal rule, courts of equity acting in conformity with it, have held that the wife cannot bind herself personally, nor bind her *separate estate*, by her general personal engagements. If, therefore, the wife contracts debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a court of equity will not direct an application of such estate to be made for that purpose; (2 Roper, side page, 235; *Coleman v. Woolley's Ex'r*, 10 B. Monroe, 320.)"

"Courts of equity, however, as a consequence of the doctrine established by them, that a married woman may have and enjoy separate estate, enable her to deal with it and to alien or encumber it, when she shows an intention so to dispose of it; but that intention must be manifest by her, otherwise her separate estate will not be held liable. Its liability for her debts does not arise out of their creation merely, but out of an agreement by her, either express or implied, that it shall be liable for their payment."

"It has been held by this court, that the execution by a *feme covert* of a bond or a promissory note, or the endorsement by her of a bill of exchange, should be regarded as a sufficient indication of her intention to

charge her separate property with the payment of the debt. In such cases, although no reference be made to her separate estate, the execution of the security is deemed to be an implied agreement on her part that it shall be liable for the demand; (*Jarman, &c. v. Wilkerson*, 7 B. Monroe, 293; *Bell & Terry v. Kellar*, 13 Id. 384.)"

"The extent to which her separate property may be subjected to the demands of creditors claiming under parol agreements, has not been determined by this court. So far as the separate property consists of land, it cannot be made liable by a verbal contract. The wife cannot alien or dispose of her real estate except by a written agreement; and as a charge upon it for the payment of debts, operates as a disposition of it *pro tanto*, it can only be created by a contract in writing; (*Clark v. Miller*, 2 Atk. 379.) But with respect to other separate estate, consisting of personalty and slaves, where she has verbally agreed that part of it shall be appropriated to the payment of a debt which she is about to create, there seems to be no good reason why this agreement should not be regarded as constituting a charge upon it. Where, however, a verbal agreement is made, without any reference to her separate estate, then it will not be bound, unless the circumstances are sufficient to prove that, in fact, the understanding between her and the person with whom she has contracted was that it should be liable. But where there is no express agreement, and one arises only by implication, a court of equity will not allow such implied agreement to extend to any except that part of the estate which, it may be inferred from the circumstances, the wife intended

to charge with the payment of the debt."

"Now, applying these principles to the demands asserted in the present suit, the right of the creditors to any relief, is very questionable. No express agreement by the wife to charge her separate estate for the payment of debts, was either alleged or proved. The mere fact that they were contracted by her, does not, as we have seen, render her *separate estate* liable for their payment. Were they, then, contracted under such circumstances as will justify the presumption that the contracting parties understood that they were to be a charge upon her separate property? The wife did not, when the debts were created, live apart from her husband, nor is it shown that he was insolvent. The only circumstance from which it can be inferred that an understanding existed, both on her part and the part of the creditors, that the debts were to some extent to be a charge upon her *separate estate* is, that the accounts were created in the name of the trustee, as may be presumed, with her knowledge and consent, inasmuch as she executed receipts to him for some debts which had been created in the same manner, and had been paid by him. The agreement of the trustee, that her separate property should be liable for the debts, cannot create any charge upon it. Her own contract is indispensably necessary for this purpose; and such a contract on her part can only be implied in this case from the fact that she knew her creditors looked to her separate property for the payment of their debts, and with this knowledge, continued to deal with them, and permitted her trustee to pay the debts thus contracted by her,

out of her estate. On this ground we think her separate estate should be chargeable with the payment of these debts."

"But the question still arises as to how far a court of equity will extend this implied agreement by her, that her separate estate should be liable for the payment of these debts. They were all created merely for the current expenditures of the family; none of them arose out of a contract for the purchase of land or slaves, or for any property but such as would be consumed in the use. It cannot be presumed, in the absence of any express agreement to that effect, and without the execution of a security in writing, that she intended to create a charge on the principal of the estate, and subject it to sale for the payment of store accounts and other current family expenditures. The only reasonable and legitimate presumption is, that she intended the profits of her estate to defray her current expenses, and a court of equity should not carry the implication against her to any greater extent. If parties deal with a married woman without any express contract in reference to her separate property, they have no reason to complain if, in furnishing her with articles for consumption merely, they are restricted to the profits of her estate, and are not permitted to subject the estate itself to sale for the payment of their demands."

In the recent case of *Hardy v. Van Harlingen*, 7 Ohio, N. S. 208, the court declined to express any opinion as to what the rule might be when real estate was in question, or when a gift, was made to the separate use of a married woman by her husband or by any other person; but held

that the effect of an ante-nuptial agreement, in which it was stipulated that the wife should retain the entire control of a fund which had been bequeathed to her by her father, in as full and perfect a manner as if she were sole, was to invest her with the power of disposing of the fund thus settled absolutely, and consequently of bestowing the whole on her husband as a gift, and without any consideration.]

In Pennsylvania, the views of Chancellor Kent have been fully adopted, and it is firmly settled that a *feme covert* has no power in relation to her separate estate, but such as is expressly given to her, in the deed of settlement; *Lancaster v. Dolan*, 1 Rawle, 231, 248; *Lyne's Ex'r v. Crouse et al.*, 1 Barr, 111; *Rogers v. Smith*, 4 Id. 93, 98. "The modern doctrine of [English] courts of equity," said Gibson, C. J., in *Thomas v. Folwell*, 2 Wharton, 11, 16, "is founded on what appears to be a misconception of the leading purpose of a settlement, which is obviously to disable the husband, and not to enable the wife, at least further than may be consistent with the security of her title, of which the grantor ought, in the particular case, to be the judge. The object is not so much to give her the dominion of a *feme sole*, which every man of experience knows would, in a countless number of instances, defeat the principal intent, as to withdraw the estate from the dominion of the husband; and we might expect it to occur to those who are called to the interpretation of these instruments, that the surest way to accomplish this, would be to restrain the power of both. We therefore hold it to be the settled law of Pennsylvania, that instead of

having every power from which she is not negatively debarred in the conveyance, she shall be deemed to have none but what is positively given or reserved to her." The bond of a married woman will not bind her estate; *Dorrance v. Scott*, 3 Wharton, 309, 316: and it appears, even, that her separate estate will not be liable upon her contracts for necessities, unless there be an express power to charge it given in the settlement, and then only where it expressly appears at the time the necessities were furnished, that it was intended to bind her separate estate; *Wallace v. Coston*, 9 Watts, 137, 138, and *Moravian Brethren v. Greenleaf and Wife*, there cited.

[The fallacy of the reason on which the course of decision is founded seems to be, so far, at least, as land is in question, that a married woman has always had full power, in Pennsylvania, to dispose of land, with the assent and concurrence of her husband, by a deed duly acknowledged, separately and apart from him. In order, therefore, to sustain *Lancaster v. Dolan*, and *Dorrance v. Scott*, it must be contended, that a deed to the separate use of a *feme covert*, disables the wife, and takes away a power which she would unquestionably have had, if the conveyance had been to her generally, an effect which can hardly be ascribed to a gift which purports to confer a full and unrestricted right of property.]

In Rhode Island, Tennessee, and in Mississippi, the rule of the South Carolina cases and of Chancellor Kent, is adopted; and a *feme covert* is, as to her separate estate, a *feme sole*, only in so far as the settlement has expressly conferred on her the power of acting as such; she has

no power over her separate estate, but such as has been specially given to her therein, which is to be strictly construed, and in exercising the power of disposition, she is restricted to the particular mode therein provided; her separate estate is, therefore, not liable upon a bond or promissory note executed by her with her husband, where the settlement has not expressly declared that it shall be liable; *Ware v. Sharp*, 1 Swan, 489; *Morgan v. Elam*, 4 Yerger, 375; *Marshall v. Stevens et als.*, 8 Humphreys, 159, 173; *Litton v. Baldwin et als.*, Id. 209; *Armstrong v. Stoval*, 26 Mississippi, 275; *Dotey et al. v. Mitchell*, 9 Smedes & Marshall, 435, 447; *Montgomery et al. v. The Agricultural Bank*, 10 Id. 567, 576; *Metcalf v. Cook*, 2 Rhode Island, 355; and a similar rule seems to have prevailed in Maryland; *Tarr v. Williams*, 4 Maryland, Ch. 68; *Williams v. Donaldson*, Ib. 414; *Miller v. Williamson*, 5 Maryland, 219; until the recent case of *Cooke v. Husbands*, 11 Maryland, 492, *ante*. In Virginia, the same view has been expressed in one case: "Upon the best reflection which I can give to this matter," said Tucker, P., "I am of opinion that a *feme covert*, holding separate property in real estate, by deed or will, prescribing a peculiar mode of disposition, cannot dispose of it in any other mode, although the deed or will does not negative such other mode expressly;" *Williamson v. Beckham*, 8 Leigh, 20, 27. But *Woodson, Trustee, v. Perkins*, 5 Grattan, 346, seems to adopt the English rule; while, in *Nixon v. Rose*, 12 Id. 425, the court expressed the opinion, that although the *jus disponendi* is *prima facie* inherent in a gift, to the separate use of a married

woman, it may, notwithstanding, be withheld from her by the donor, and that she, consequently, could not exercise it, where he declared his wish to be, to guard against an imprudent disposition of the property, and that he consequently confided it solely to the discretion of a trustee. In North Carolina, the general principle appears to be left undetermined; but it has been decided, that a married woman may charge the profits of her separate estate in land, and dispose absolutely of her interest in personal property, by any instrument or means, which refers to the estate, and distinctly denotes an intention to bind it; *Frazier v. Brownlow*, 3 Iredell's Equity, 237; *Harris v. Harris*, 7 Id. 111: see *Newlin v. Freeman*, 4 Id. 312, 316. In Alabama and Kentucky, the earlier cases inclined toward the English rule; *Forrest et al. v. Robinson, Ex'r*, 4 Porter, 44, 50; *Saddler et ux. et al. v. Houston & Gillespie*, Id. 208, 211; *Long's Adm'r v. White's Adm'rs & Heirs*, 5 J. J. Marshall, 226, 230; which has been adopted unequivocally in the later. In *Bradford and Wife v. Greenway*; *Henry v. Smith*, 17 Alabama, 797, 805, the court said, "We hold, that where a married woman has property settled upon her, to her separate use, and the deed of settlement provides that she shall have 'the complete control of it, as though the marriage had never taken place,' and contains no restraint on alienation, she is to be deemed, in a court of equity, in respect to such property, a *feme sole*, and may, by her agreement, freely entered into, charge it for the payment of her husband's debts. See, also, *Purveyor & Wallace v. Beard, Trustee*, 14 Alabama, 122, 134, and

Puryear, Ex'r, v. *Puryear*, 16 Alabama, 486; *Collins v. Lavenberg*, 19 Id. 682. The same view was taken in *Ozley v. Ikelheimer*, 26 Id. 382; and a written engagement for the payment of money by a *feme covert*, held to imply an intention to make her separate estate answerable for its fulfilment. The English rule is expressly adopted in Connecticut; *Imlay v. Huntington*, 20 Connecticut, 149, 175. It has been said in Kentucky, that a *feme covert's* general personal engagements will not bind her separate estate; but, that if she is living apart from her husband, her intention to charge it by debts which she contracts, is to be inferred; *Coleman v. Woolley's Ex'r*, 10 B. Monroe, 320; while the cases of *Bell v. Kellar*, 13 Id. 381; *Lillard v. Turner*, 16 Id. 374; and *Burch v. Breckenridge*, Ib. 482, decide that a similar inference is to be drawn from the execution or endorsement of a bill or note, or from any other act or contract by a married woman, which denotes an intention to bind her property, and not merely to go through the vain form of binding herself personally; and the rule would seem to be the same in Missouri; *Segond v. Garland*, 23 Missouri, 547; *Whitesides v. Carmon*, Ib. 357.

No particular technical form of words is necessary to create a trust for the separate use of a married woman. It is enough that there be a clear and unequivocal intent to exclude the rights of the husband. If it be plain from the language of the instrument, or from all the circumstances disclosed in it, that the intention was to create a separate interest in the wife, this intention will be sustained and carried out; *Stuart v.*

Kissam, 2 Barbour, 494, 496; *West v. West's Ex'rs*, 3 Randolph, 373; *Lewis v. Adams*, 6 Leigh, 320, 331, 335; *Perry v. Boileau*, 10 Sergeant & Rawle, 208; *Ballard and Wife v. Taylor et al.*, 4 Dessausure, 550; *Davis et ux. v. Cain's Ex'r*, 1 Iredell's Equity, 305, 307; *Heathman v. Hall*, 3 Id. 414, 420; *Hamilton v. Bishop & Fly*, 8 Yerger, 33, 40; *Beaufort, Adm'r*, v. *Collier*, 6 Humphreys, 487, 490; *Somers v. Craig*, 9 Id. 467; *Nixon v. Rose*, 12 Gratian, 425, 428; *Fears v. Brooks*, 12 Georgia, 195; no particular, or even express words, being necessary to effectuate the intention, if manifest; *Fears v. Brooks*; *Clark v. Maguire*, 16 Missouri, 362. But the intention to settle the property to the separate use of the wife must be unequivocal and unambiguous. The intent must be evident, not merely to vest an interest in the wife, but to vest the entire interest in her, to the exclusion of the husband. To sustain the claim of the wife, it is not enough that such a construction is possible or probable, or that one view is as consistent with the instrument as the other: the husband cannot be excluded by implication or conjecture. The instrument must either manifest a design to exclude him, or must contain provisions inconsistent with the assertion of his marital rights in respect to the property: see *Rudisell v. Watson*, 2 Devereux, Equity, 430, 432; *Ashcraft v. Little*, 4 Iredell's Equity, 236, 238; *Hunt & Tucker v. Booth, Edwards & Hunt*, 1 Freeman, 215, 218; *Williams v. Claiborne et al.*, 7 Smedes & Marshall, 488, 495; *Carroll v. Lee*, 3 Gill & Johnson, 505, 508; *Evans and Wife v. Knorr*, 4 Rawle, 66, 73; *Evans v. Gillespie*, 1 Swan, 128;

Cook v. Kennerly & Smith, 12 Alabama, 42, 46, and cases there cited; *Moss v. McCall*, Id. 630, 635; *Pollard et al. v. Merrill & Eximor*, 15 Id. 170, 173; *Mitchell v. Gates*, 23 Id. 438; *Welch's Heirs v. Welch's Adm'r*, 14 Id. 76; *Hale et al. v. Stone*, Id. 803, where the subject is much discussed. A mere bequest to a *feme covert*, will not be to her separate use; *Fitch v. Eyer*, 2 Connecticut, 143, 146; *Shirley v. Shirley*, 9 Paige, 364; nor will the intervention of a trustee be of itself, sufficient to create a separate use; property given by deed or will, to a trustee in trust for a married woman, vests in the husband; *Evans and Wife v. Knorr*; *Mayberry v. Neely et als.*, 5 Humphreys, 337, 339; *Hunt & Tucker v. Booth, Edwards & Hunt*, 1 Freeman, 215, 218; *Welch's Heirs v. Welch's Adm'r*, 14 Alabama, 77; *Pollard et al. v. Merrill & Eximor*, 15 Id. 170, 174; but a conveyance by a husband to a trustee for the use of the wife, will necessarily be for her separate use, otherwise the transaction would be futile; *Steel v. Steel*, 1 Iredell's Equity, 452, 455; and the same is true of a gift or grant by the husband directly to the wife for her use; *Whitten and others v. Whitten*, 3 Cushing, 194, 199; *Powell v. Powell*, 9 Humphreys, 477, 486; *Wells v. Treadwell*, 28 Mississippi, 717. [Such grants are however, void in law, and will, it has been said, be upheld by equity no further than is necessary to constitute a just and adequate provision for the wife, due regard being had to the fortune of the husband; *Benedict v. Montgomery*, 7 W. & S. 238, 242; *Stickney v. Borman*, 2 Barr, 67; *Shepard v. Shepard*, 7 Johnson's

Chancery, 57; *Wells v. Treadwell*; see *Dibble v. Hutton*, 1 Day, 51.]

The following expressions have been held not to create a separate use in a married woman: a devise and bequest of lands and chattels to the testator's married daughter, "all to be for her and her heirs' proper use;" *Rudisell v. Watson*, 2 Devereux, Equity, 430, 432: a conveyance of chattels to a married woman, "but the said gift to extend to no other person;" *Ashcraft v. Little*, 4 Iredell's Equity, 236, 238; a devise of lands "in trust for the use, benefit and behoof of" the testator's daughter for life; *Torbert v. Twining et al.*, 1 Yeates, 432: a conveyance of slaves to a trustee, in trust to permit the *feme covert* "to have the use and benefit of the labor and services of the said slaves, and all the proceeds thereof during her life, and at her death" to her children; *Hale et al. v. Stone*, 14 Alabama, 803; see also *Evans and Wife v. Knorr*, 4 Rawle, 66, and *Clevenstine's Appeal*, 3 Harris, 495. On the other hand a bequest to a married woman "for her own use;" *Jamison v. Brady and Wife*, 6 Sergeant & Rawle, 466; or "for her own proper use;" *Snyder v. Snyder*, 10 Barr, 423; or "her own and sole use;" *Jarvis v. Prentice*, 19 Connecticut, 273, 282; and a devise to a *feme covert* "to be for her and her family's use, during her natural life;" *Heck v. Clippenger*, 5 Barr, 385; the interest of a sum to a married woman "to be paid to her in equal half yearly payments during her natural life," and afterwards to her children; *Tyson's Appeal*, 10 Id. 221; a conveyance of chattels, "for the entire use, benefit, profit and advantage of" the *feme covert*; *Heath-*

man v. Hall, 3 Iredell's Equity, 414, 421; for "her sole and only use" and benefit; *Goodrene v. Goodrene*, 8 Iredell, Equity, 313; *Cuthbert v. Rolf*, 19 Alabama, 373; a gift of chattels, "to the use and benefit of said E. and children, and to remain in possession of said E. for the use and support of said children forever;" *Hamilton v. Bishop & Fly*, 8 Yerger, 33, 40; a bequest to a married woman "to be at her own disposal in true faith to her and her heirs forever;" *Bridges v. Wood*, 4 Dana, 610; a deed of gift to a trustee, "in trust for the proper use and benefit of the said (*feme covert*) and her heirs forever;" *Warren v. Haley et al.*, 1 Smedes and Marshall's Chancery, 647, 651; a conveyance of slaves to a married woman, "to her and her heirs, to have and to hold the same, to and for her use, benefit, and right, and of the heirs aforesaid without let, hindrance or molestation, whatever;" *Newman v. James & Newman*, 12 Alabama, 29; or to her "and her heirs after her, free from the claim or claims of any person or manner of persons whatever, absolutely as their own property right, as fully as though they had purchased them;" *Brown v. Johnson*, 17 Id. 232; or "exclusively to her and the heirs of her body forever;" *Gould v. Hill*, 18 Alabama, 84; a declaration of trust that the party held the property "for the sole use and benefit of, and in trust for Mrs. S., and that he would account for and pay over to her individually, all moneys that might be received thereon;" *Stuart v. Kissam*, 2 Barbour, 494, 496; have been held to create a separate use. The principle of construction is one in which all the courts agree, but in the application, the cases can hardly be recon-

ciled; *Rudisell v. Watson*, and *Warren v. Haley et al.*, are in direct conflict; and *Ashcroft v. Little* could scarcely stand with *Newman v. James and Newman*.

The intervention of a trustee is not necessary to the validity of a trust to the separate use of a married woman. If real or personal property be given to her separate use, her interest will be protected by converting the husband into a trustee; *Boykin and Wife v. Ciples and Wife*, 2 Hill's Chancery, 200, 203; *Baskins v. Giles*, Rice's Equity, 316, 324; *Clark v. Makenna*, Cheves' Equity, 163, 166; *Long's Adm'r v. White's Adm'rs and Heirs*, 5 J. J. Marshall, 226, 227; *Trenton Banking Co. v. Woodruff et al.*, 1 Green's Chancery, 118, 126; *Steel v. Steel*, 1 Iredell's Equity, 452, 455; *Freeman v. Freeman and Chalis*, 9 Missouri, 772; *Hamilton v. Bishop*, 8 Yerger, 33, 41; *Jamison v. Brady and Wife*, 6 Sergeant and Rawle, 466; *Heck v. Clippenger*, 5 Barr, 385, 387; *Shirley v. Shirley*, 9 Paige, 364; *Fears v. Brooks*, 12 Georgia, 195.

[Trusts designed to protect the rights of the wife, against an undue exercise of the power of the husband, can only, from their own nature, be effectual when the relation of husband and wife exists, and while it is still in being; and, hence, property held for the separate use of a feme sole, before marriage, or of a widow, after the death of the husband, will be absolutely subject to her control and disposition, and may be aliened, as if no trust existed, even when the gift contains an express restraint on the power of alienation; *Tullett v. Armstrong*, 1 Beavan, 1; 4 Mylne & Craige, 390; *Scarborough v. Boman*, 1 Bea-

van, 34; 4 Mylne & Craig, 377; *Clarke v. Wyndham*, 12 Alabama, 870; *Miller v. Bingham*, 1 Iredell's Equity, 423; *Smith v. Stair*, 3 Wharton, 62; *Hammersly v. Smith*, 4 Id. 126.

This is a necessary result of the rule that the gift of a right confers the right of aliening it, and that creditors are entitled to the benefit of every power which can be exercised by the debtor; *Brandon v. Robinson*, 18 Vesey, 429; *Hallett v. Thompson*, 5 Paige, 383; *Dick v. Pitch*, 1 Dev. & Bat. Eq. 480; *The Blackstone Bank v. Davis*, 21 Pick. 42; *Hammersly v. Smith*, 4 Wharton, 126; *Nickel v. Hanly*, 10 Grattan, 336; 1 Smith's Leading Cases, 103, 522, 5 Am. ed.; which may be temporarily suspended by or during the disability of coverture; but which revives, as of course, when the coverture terminates. Marriage disables the wife from alienating her property at law, and equity may, therefore, permit or impose a similar disability in analogy to the law, but it cannot fetter the hands of a *feme sole* without violating well-established legal principles. *Hammersly v. Smith*, 4 Wharton, 126. Estates for life or years, not extending beyond a life or lives in being and twenty-one years afterwards, undoubtedly differ from those of inheritance, and may be made the subject of a condition against voluntary or involuntary alienation, with a limitation over in case of breach, which would be void if attached to an estate in tail or fee. *Rochford v. Hackman*, 9 Hare, 475; 10 Eng. Law & Eq. 68; 1 Smith's Leading Cases, 101, 5th ed. But the English courts adhere inflexibly to the principle, that no interest can be retained by or held for a debtor, without being subject to seizure for his debts, and that the only

way to exclude the claims of creditors, or prevent alienation, is to provide that the estate shall determine if aliened. Hill on Trustees, 395. The question was examined with much ability in the recent case of *Nicholson v. Miller*, 10 Grattan, 334, 343, by Manning, J., who held the following language in the course of his opinion, which, although overruled on the point before the court, may be taken as a safe guide to the general rule of law: "Property has certain legal incidents, of which it cannot be divested; and all conditions adopted for that purpose are necessarily repugnant and void: one of these incidents is, its liability for the debts of its owner. 'Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift from its liability to the debts of the donee; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer by operation of law of the whole estate; and it is immaterial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest, than to an absolute or transmissible property. Whatever remained in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law, in such event, has cast the property.' This is the language used in 1 Jarman on Wills, 816, and it is fully sustained by the authorities therein cited. 'There is no doubt,' as Lord Eldon said, in *Brandon v. Robinson*, 18 Ves. R. 429, 'that property may be given to a man until he shall become bankrupt: it is equally clear, generally

speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.' The condition must determine the interest, or it is repugnant and void. The continuance of the interest and its exemption from liability for the debts of the owner, is a legal impossibility.

"The case of a settlement on a married woman, or in reference to coverture, is an apparent exception to the rule that conditions restraining the power of alienation and exempting property from liability for the debts of its owner, are repugnant and void. But a *feme covert* can own no property at law. Separate property is a creature of equity. And as equity confers the power of alienation as an incident to the trust for separate use, it allows the power to be modified as convenience or the exigency of the case may require. 'When this Court (says Lord Cottenham,) first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found as a part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again

interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation.' *Tullet v. Armstrong*, 4 Mylne & Craig, 377; 18 Eng. Ch. R. 404. But this doctrine is not applicable to unmarried women, a restriction on the aliening power of a woman not under coverture, being no less inoperative than a similar restraint on the *jus disponendi* of a person of the male sex. 1 Jarman on Wills, 830. And even in a case of a settlement on a married woman, a restriction on her power of alienation is confined to the coverture, and begins and ceases with it; so that when she becomes discovert, she has the same power of disposition over her property as other persons; *Id.*; *Barton v. Briscoe*, Jacobs's R. 603; *Jones v. Salter*, 2 Russ. & Myl. 208; 6 Cond. Eng. Ch. R. 463; *Woodmeston v. Walker*, 2 *Id.* 197; 6 Cond. Eng. Ch. R. 457; and of course it is as much liable for her debts as is the property of other persons for their debts."

In *Massey v. Parker*, 2 Mylne & Keene, 174, the court went beyond the legitimate consequence of these premises, and expressed the opinion, that a subsequent marriage, far from calling a prior limitation to the separate use of the wife into action, would defeat it altogether, by operating as a virtual transfer of the property to her husband, and that to render such limitations effectual, they must be created during marriage, or with reference to a marriage actually contemplated. The view thus taken was cited with approbation, in *Hammersly v. Smith*, and a trust for the separate use of a married woman held to cease, absolutely, upon her becoming a widow, and not to be revived by a second marriage.

But the better opinion would seem to be, that a trust for the separate use of an unmarried woman will take effect upon a subsequent coverture, unless defeated by some act done by her while *sole*, and, although necessarily suspended during widowhood, will be good on re-marriage, as against the second husband. The law has been so held in several instances in this country; *Beauford v. Collin*, 6 Humphreys, 487, 491; *Roberts v. West*, 15 Georgia, 123; *Shirley v. Shirley*, 9 Paige, 364; *Waters v. Tazewell*, 9 Maryland, 291; and is now firmly settled on the same basis in England, by the recent cases of *Tullett v. Armstrong*, and *Scarborough v. Borman*, which decide that the validity of a restraint on the power of the husband, or on that of the wife, depends on her condition when the power is exercised, and not whether she is married or single, at the time when the gift is made, and, that while a woman may dispose absolutely of her property before marriage, or after the death of her husband, notwithstanding a declaration that it shall be held for her separate use, and without the right of charge or alienation, the trust will attach as soon as she is married, and revive for her protection during each succeeding coverture, unless defeated during the intermediate periods. A similar decision was made in *In re Gaffee*, 7 Hare, 101; 13 Jurist, 74, overruling the decision of the court below; and a restraint on the power of alienation in a settlement for the separate use of a married woman, held to be effectual during each and every successive coverture, whenever it is imposed in or by the clause which creates or limits the estate, and there is nothing in the rest of the instru-

ment to warrant an opposite conclusion. This course of decision is obviously more consonant with the just and liberal regard for the rights of married women, which forms a distinguishing feature of equity, than that pursued in *Hammersly v. Smith*, which is the more inexplicable, because it was founded upon the English doctrine, that creditors and purchasers are entitled to take everything which the debtor or vendor can use or keep, and that the only way of excluding them, is by imposing a forfeiture on him, if a sale be made, or an execution issued, which has been repudiated by the Supreme Court of Pennsylvania, and by several of the other superior tribunals of this country, as inapplicable to provisions for support and maintenance, when restricted within the well known limits which cannot be transgressed without creating a perpetuity. A trust may, accordingly, be created in that State, and in some other parts of the Union, for the descendants of the grantor, and, as it would seem, for anyone whom he may choose to render the recipient of his bounty, free from liability for debts, and without the power of alienation; *Fisher v. Taylor*, 2 Rawle, 33; *Holdship v. Patterson*, 7 Watts, 547; *Ashurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 Id. 19; *Norris v. Johnstone*, 5 Barr, 289; *Eyrick v. Hetrick*, 1 Harris, 488, 491; *Pope v. Elliott*, 8 B. Monroe, 56; *Beaman v. Stites*, 2 Pick. 463; and the power to create such a trust, obviously implies that of raising a separate use for a daughter, on a future marriage, and precluding her from aliening or defeating it while *sole*. The greater always includes the less, and the claims of a future husband

certainly do not stand on higher grounds than those of grantees and creditors. Liability for debts, and the right of alienation, are, however, viewed as inseparable incidents to the right of property, by many of the courts of this country, except during coverture, *ante*; and it was accordingly held, in *Clark v. Wyndham*, 12 Alabama, 800, that a restraint on alienation, in a gift to the separate use of a married woman, necessarily comes to an end with the termination of the coverture, and will not preclude her from disposing of the property in any manner which she may think proper. The courts of Alabama and Virginia have, however, decided, that a grant or devise, in trust for the support of a family, cannot be taken in execution for the debts of a father or husband, even when he is entitled to share in the benefit of the gift, or expressly designated as one of the beneficiaries; *Markham v. Watkins*, 4 Leigh, 279; *Perkin's Estate v. Dickerson*, 3 Grattan, 335; *Hill v. M'Rae*, 27 Alabama, 175; and if such a trust can be created by way of anticipation, with a view to the support of a future family, with the effect of precluding alienation during the interval before marriage, it may obvi-

ously be so framed, as to give rise to a separate use for a woman, upon coverture, and prevent her from defeating it while *sole*. The question arose in the recent case of *Nickels v. Miller*, 10 Grattan, 336, which decides that a trust for the support of a mother and her children, during marriage, cannot be taken in execution for the debts of the *cestuis que trust*, even after the coverture has been determined by the death of the husband, which would seem to imply that a provision may be made for an unmarried woman, and for any children whom she may have by a future husband, in such a form as to be unalienable while she is *sole*.

Some of the cases have taken the ground, that a trust for the support of a married woman and her family, will be placed by equity upon the same ground as if it were for her separate use, even when it includes her husband, and consequently cannot be alienated or taken in execution for debts contracted by him, or the other beneficiaries, during coverture; *Perkin's Estate v. Dickerson*, 3 Grattan, 355; *Markham v. Watkins*, 4 Leigh, 279; *Hill v. M'Rae*, 27 Alabama, 175; or even after it has terminated; *Nickels v. Miller*, 10 Grattan, 336.]

SALES OF EXPECTANCIES.—CONSTRUCTIVE FRAUD.

[*428] *EARL OF CHESTERFIELD v. SIR ABRAHAM JANSSEN.

FEBRUARY 4, 1750-1.

REPORTED 2 VES. 125.¹

POST OBIT SECURITIES—CATCHING BARGAINS WITH HEIRS EXPECTANTS AND REVERSIONERS—CONFIRMATION.]—*A., aged thirty, borrows £5000 from B., upon the security of a bond in the penalty of £20,000, conditioned for payment of £10,000 if A. survived C., his grandmother, from whom he had great expectations, but not otherwise. A. survived C. a year and eight months, and soon after her death executed a new bond in the penalty of £20,000, conditioned for payment of £10,000 to B., which he gave to B. on his delivering up to him the former bond to be cancelled.*

A bill being filed by the executors of A. to be relieved against the latter bond, as given upon an usurious contract, and an unconscionable bargain, the Court was of opinion that the contract was not usurious, and, without giving any opinion whether the transaction was such as the Court ought to relieve against, as an unconscionable bargain with a person dealing with his expectancy, held, that the acts of A., after the decease of his grandmother, amounted to a confirmation of the original transaction, and gave relief only against the penalty of the last bond.

THE state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this. John Spencer, in 1738, being possessed of an income of £7000 per annum, and of a personal estate in plate, jewels, and furniture, to a great value, and having [*429] *contracted a debt to the amount of £20,000 to several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of £5000 for that purpose.

As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty, originally of a hale constitution, but impaired; and, although afterwards he lived more regularly, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight, of a good constitution for her age, and careful of her health.

He sent to market a proposal, which he supposed would easily meet with a purchaser, as it was natural to expect, in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one. This proposal was, that if any one would lend him £5000 he would oblige himself to pay £10,000 at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. This was rejected by

¹ S. C., 1 Atk. 301; 1 Wils. 286.

several knowing persons as not sufficiently advantageous, as it was at first by the defendant, but afterwards accepted by him; and a bond of £20,000, conditioned to pay £10,000, was given on those terms.

['The Duchess of Marlborough died the 18th of October, 1744, and in the month of December following, on the defendant's delivering to Mr. Spencer the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of £20,000 conditioned for payment to the defendant of £10,000, with lawful interest on the 19th of April then next; and at the same time executed a warrant of attorney to empower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said £20,000 on the said bond. The defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. Spencer, at the *defendant's suit, for the said £20,000, to be recorded in the King's Bench of Hilary Term [*430] next ensuing the date of the said bond.

In the month of December, 1745, the defendant, by the invitation of Mr. Spencer, being with him at his house at Windsor, he, on the 14th of that month, gave the defendant a bill for £1000 on Hoare and Company, in part of the defendant's debt, and on the 21st of March following sent the defendant £1000 more by his steward.

On the 19th of June, 1746, Mr. Spencer died, but before his death made his will, and after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal, the present Mr. Spencer, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

The executors of Mr. Spencer, finding his specialty debts were very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of the testator's assets, after payment of such sums as were really and bona fide due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute and independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty; and as the period or point of time limited for the payment (which was in one month after the death of the duchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact happened soon after, so the requiring such a large sum as £10,000 for the forbearance of £5000 for so short a time, being at the proportion of £200 for every £100, was a most usurious contract, and such as will never meet with the approbation or countenance of a court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and *honest [*431] creditors, and of an infant heir and residuary legatee; and that the executing a new bond to the defendant, after the death of the Duchess of

¹ This statement between brackets, is taken from 1 Atk. 301.

Marlborough, is only a continuance of the former transactions, and partook of the original fraud; and that, being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it; but on the contrary, defendant, on acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment till the Court have first inquired into and determined upon the fraud; and therefore, it is prayed that the defendant may be adjudged by the Court to be a creditor of Mr. Spencer, only for such sums as he shall appear to have bona fide advanced, with interest from the time of advancing the same, after deducting what he hath received; and that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only, and interest *pari passu*, with Mr. Spencer's other creditors, according to the nature of his demand; and for an injunction to stay his proceedings at law till the hearing of the cause.

July the 21st, 1747, the injunction was continued upon the merits till the hearing.]

Mr. Noel, Mr. Clarke, Mr. Wilbraham, and Mr. Crowle, for the plaintiffs.

This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a court of equity, payment of principal really advanced, and legal interest. There are three general points to be determined. First, how that contract would have stood if properly brought in judgment in a court of law, and considered merely upon legal principles? Next, what the fate of it ought to be, in a much stronger degree, in a court of equity, when [*432] examined by principles of equity? Lastly, the subsequent *transactions relied upon in the answer as a ratification of the original bargain.

As to the first, it is not good in point of law, and therefore usurious. Oppression of this kind is almost of as ancient date as the use of money as a medium of trade, and usury of a much more innocent nature was against the principles not only of the canon law, but of the common law of the land. Lord Coke says, in 3 Inst. 151, that a man being found guilty of usury after his death, all his goods were forfeited to the crown; although it is now altered by several statutes, which confine it to such a quantum, allowing a certain moderate profit for the use of money: the difference, therefore, between usury and interest is, in specie, nothing, but in gradu. Though the severity of the common law is changed, the nature of things cannot be changed. It was the constitution of this country, and is so, that no gain should be exorbitant on the loan of money; and therefore it is immaterial whether it falls within the statutes or no, but this case does. Where such a contract is originally for the loan of money, and exceeding the legal allowance, it is rescinded by the Act of Parliament itself, though attended in some measure with a chance, being construed a subterfuge and evasion of the act; for, if it may be extended to one life, it is difficult to tell where to stop. The legislature took

a different method formerly ; in the first acts describing minutely what species should be allowed, confining it to a direct loan of money for illegal gain, or sale of goods or merchandise to persons in necessity ; the specifying whereof introduced endeavors to evade the particular kind of usury described. Therefore, the 21 Jac. c. 17, is in general terms ; in consequence of which, courts of law were vested with a kind of equitable jurisdiction, to consider the circumstances of the case, stated as particularly as in bills in this Court. The intent of the parties at the original communication is considered even by the courts of law as decisive ; and where that is for a loan of money, or colorable sale of goods, whatever is thrown in of a different kind, it is usurious, otherwise not : **Reynolds v. Clayton*, Mo. 397, and *Becher's case* there [*433] cited. Next, wherever security is taken for a larger sum than is really advanced, it is usurious ; unless the party may deliver himself therefrom by paying a less, or by doing some collateral act. The throwing something hazardous into the bargain, by which (as it is insisted) the lender might, in some event, have lost the whole, will not take it out of the statutes, and seems to have arisen from the statute 11 H. 7, c. 8, telling how far one might go to keep out of the acts : Mo. 397, and *Button v. Downham*, Cro. Eliz. 642 ; *Burton's case*, 5 Co. 69 ; *Roberts v. Trenayne*, Cro. Jac. 507 ; *Cottrel v. Harrington*, Brownlow, 180 ; *Fuller's case*, 4 Leon. 208 ; Noy, 151 ; 2 And. 15 ; and *Mason v. Adby*, Carth. 67 ; 3 Salk. 390 ; Comberb. 125. The only exception is the *fœnus nauticum*, or bottomry bonds ; which, for the sake of the public and benefit of trade, are held not within the statutes of usury. The only view of the parties here was a loan of money, and security for double the sum advanced, subject to the contingency ; the borrower could not deliver himself from the payment ; and the Court will then lay everything else out of the case. In the calculation of lives, it is difficult to say where the true rule is : Halley and Newton have varied ; but, on the first sight, one would think the lender had here greatly the advantage, from the disproportion ; so that, on the face of it, it would be deemed a subterfuge in a court of law. Suppose the bond existing, and an action brought by the defendant, after the grandmother's death, and the statute of usury pleaded ; the parties may advance matters *dehors* ; and it would be determined to be within the statute, which is very extensive, and, though penal, to have a liberal construction. The terms on which men communicate to borrow and lend, cannot alter the nature of the case. The quantum of the risk is not material, nor did the transaction proceed on the comparison of lives, or health, or constitution ; but, if it did, the defendant was satisfied of the contrary to what he now endeavors to support by proof, as to the constitution of Mr. Spencer.

As to the second point : courts of equity, not being *tied up to rules, consider questions of this kind in a more extensive manner, and [*434] in general have avoided laying down any particular rule, as that would (like old statutes of usury) teach persons how far they might safely go ; but declare, that wherever there is a spark of oppression—the motive on one side, necessity to apply for money, on the other, a covetous passion for undue lucre—they always relieve ; not, indeed, setting it aside, but by giving what is really due.

Their principles have been established gradually, and with deliberation; and, if one or two judges who presided here, have differed and been unwilling, they have at last been compelled by the force of precedents and the growing evil. There were many cases for relieving against unreasonable bargains in case of young heirs in the time of Lords Ellesmere, Bacon, and Coventry. The first case afterwards is *Waller v. Dalt*, 1 Ch. Ca. 276, which was introductive of *Barny v. Beak*, 2 Ch. Ca. 136. In *Berny v. Pitt*, 2 Vern. 14, Lord Jefferies held, there was no difference, whether it was for money or wares: that the first thing prohibited by the statute is for the loan of money, and that of wares put secondarily only; and reversed Lord Nottingham's decree, who had not been long in this Court when he took that distinction. In *Birney v. Tison*, 2 Vent. 359, Lord North affirmed the decree, though he showed an unwillingness, by adding *ne trahatur in exemplum*. In *Batty v. Lloyd*, 1 Vern. 141, Lord North dismissed the bill. In *Nott v. Hill*, 1 Vern. 167, he would not relieve, and reversed Lord Nottingham's decree; but, on a bill for specific performance of the same agreement, 1 Vern. 271, he seems a little to remit that rigor he had at first, and would not countenance the practice. But *Lord Ardglass v. Muschamp*,¹ where there was both a risk and confirmation, shows he had entirely got the better of it, from the force of precedents. Other cases were before Lord Jefferies and Lords Commissioners, 1 Vern. 467; 2 Vern. 77, 78, 121, 402. So, *Twistleton v. Griffith*, 1 P. Wms. 310. In *Curwyn v. Milner*, 3 P. Wms. 293, n., Lord King, though he seems, like Lord North, to have brought *legal notions into this Court at first, yet relieved. In [*435] *Lawley v. Hooper*, 19th November, 1745,² an annuity of £200 was charged on the estate of an elder brother, as a provision for the life of a younger, who, when in distress, granted £150, part thereof, to Davenant, for £1050, seven years' purchase, with a proviso, that the vendor might repurchase on notice; but there was endorsed, that it should be on paying £75 more than originally advanced: your Lordship held it a mortgage and redeemable; and that the £75 more, when the thing was the worse for the wear, made it unfair. The principle on which the Court has gone in these cases is an unconscionable bargain; and, it being contrary to public convenience to encourage it, such contracts are generally founded in oppression, by taking advantage of the borrower's necessity, which is the general ground of the malignancy of usury; they are of public mischief, by encouraging extravagance of young men. If stopping the progress of it, as a growing evil, be thought for the public good, and no real inconvenience in laying an embargo on this sort of trade, this is *modus dignus vindice*. These contracts are generally by persons having an expectation only. Men thereby pledge their estates before they have them, consequently before they know the value. It is too true, that men generally have not so much regard to creating reversionary inconveniences, when they consult present gratifications;—know not how to estimate what they never felt the benefit of, by which their estates, like their pleasures, are gone before they enjoy them; and several poor creditors commonly fall with one of these pro-

¹ 1 Vern. 237.² 3 Atk. 278.

digals. There is no remedy immediately, by our law, against this extravagance, as by the Roman law by *curatores*, interdicting a man not of understanding sufficient to manage his own property, from the use thereof. This extravagance has established a trade of annuities and post obits, universally exclaimed against. The ruin of a man who falls into this method, is declared not to be far off; he ruins his estate without spending half; for a borrower on post obits never puts it out to interest, and many of these are purchased at above *half. Our sons may at this moment be doing the same, and [*436] all we have labored for may be gone just after our death. It is on the principle of public utility that courts of equity have gone further than the law. So, from the general inconvenience, *præmiums* for places are not allowed, because there the office falls to the man; not that he is fit for it, but the office fit for him. So in marriage brocage bonds, the first of which was *Hall v. Potter*,¹ it is not for the sake of the party seeking relief; or bonds to have so much a year out of a particular office; or by clients to agents pending suit, although the party to whom it is given appears meritorious; or by a young man just after twenty-one to his guardian. In *Shepley v. Woodhouse*,² 17th of March, 1742, a bond by a man and woman to intermarry in thirteen months after her father's death, and for a reasonable settlement—the woman above thirty, and living in her father's house—the Court went on public inconvenience, as tending to deceive and encourage disobedience to parents. The cases are not confined to young heirs; young remaindermen are as much the object; and the opinion of Lord Talbot was, that the relief of this Court should be extended to meet such contracts; they are grown into a sort of stated traffic, which tempts young men farther than their vices. Lord King indeed said, if this was *res nova*, he might have had some difficulty; and it may not be easy to draw the line. If a young heir wanted to portion a daughter, or a sum to put into trade, buy books, or for such occasions, equity might not interpose; but where it is to feed extravagance, the Court will stop there. The same set of men are generally employed in such contracts; and a catalogue of some of their fortunes is nothing but pieces of ruin out of several families. No proof of fraud or undue advantage is requisite: the case speaks for it, and otherwise it would be saying, the Court will not relieve at all, as, to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a court of equity calls it a fraud, arising from avarice on one side, and distress on the other; and will relieve on the same principles as in **Sir Thomas Meere's case*, 1 Vern. 465. So by Lord Talbot, in *Bosanquet* [*437] *v. Dashwood*, Ca. t. Talb. 40. That it was not sought by the defendant, will make no difference; the proposal generally coming from the person in distress. The defendant could not be ignorant of it, or of Mr. Spencer's expectation and dependency on his grandmother; his own witness, Richard Backwell, saying that it was hawked about that Mr. Spencer wanted money on those terms; and the necessity of concealing it from her, made him a slave to the person with whom he treated. It is literally true, that he was neither young nor an heir; but he

¹ Show. P. C. 76, 1 Eq. Ca. Ab. 89.² 2 Atk. 535.

was not old enough to manage his affairs. Twistleton was thirty-four;¹ yet was his conduct relieved against. It is not generally in the case of heirs, though called contracts with young heirs; for an heir cannot sell a reversion; though he may estop himself by fine, he cannot grant. Mr. Spencer was quasi hæres, expectant though not apparent: the duchess in loco parentis; and his dependency on her, from her constant declarations, a parental dependency, and known so to be by the defendant, who on that expectation built this contract. The contract itself, as well as witnesses, prove his necessity. The bare applying to pay two for one has been held sufficient. "Poor" and "rich" are relative terms: and however large a man's estate, if he cannot pay a debt, he is literally necessitous; and otherwise he never would have granted on post obits, or risked his expectations on such terms. Comparing the ages, the defendant cannot be said to run any risk: and the defendant has not shown that the contract moved on a comparison of the health of each: nor is there any certainty in judging, on these cases, of lives.

As to the *third* point, all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honor and a sort of wager. The bond and judgment is an evidence he *could not pay; he would go as far as possible; no money could be raised but by annual rents, whereas an immediate payment was to be made; and the borrower is a servant to the lender. Like *Curwyn v. Milner*, (19th June, 1731,) 3 P. Wms. 293, n., and *Wiseman v. Beake*, 2 Vern. 121, and *Lord Ardglass v. Muschamp*, 1 Vern. 237, where stronger instances of confirmation did not avail. So, in some of the prize causes in the Exchequer, some repeated confirmations were held rather an aggravation. *Cole v. Gibbons*, 3 P. Wms. 290, differs materially from this; for there a person, under no distress, renounced a relief he might have had.

Although the contract is usurious in law, the proper way is to come into equity to stop this species of traffic, which is of public inconvenience; no act of Parliament could be made to meet this evil, nor any rule that would not be inconvenient in particular cases. The policy of law and equity in this kingdom does nothing more than what has been done in other ages and nations, as appears from the Macedonian decree; Digest, lib. 14, tit. 6, "Law," 1, &c., where, though the words are *filius familias*, it shall not be confined to that. There ought, therefore, to be relief, on payment of the real principal and interest.

Mr. Attorney-General (Sir Dudley Rider,) and Mr. Solicitor-General (Mr. Murray,) for the defendant.—This is indeed a matter of importance, being a question whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him. If (as has been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be wrong in itself, than uncertain. So far as

¹ See *Twistleton v. Griffith*, 1 P. Wms. 310.

a court of equity can prevent such destruction by general rules, it will lay down such rules, but will not endeavor to preserve a weak or wicked man; nor say, that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom.

The question of law must arise out of the fact; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, *taking in the convenience and inconvenience, but still the ground to go upon must be made out by evidence. It will here- [*439] by be shown that this is a fair, honest, and honorable contract.

The circumstances come under these heads—first, the character, situation, and figure of life of the obligor; secondly, the same as to the obligee; thirdly, the motive or reasonableness thereof, inducing the obligor to solicit such a bargain; fourthly, the manner of transacting and concluding; fifthly, the fairness and equity of the price, from the chance, under all the circumstances, according to the probability at the time and the event, that has happened; sixthly, the opinion the obligor always had of this.

As to the *first*, it is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty; no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir (although *nemo hæres viventis*,) he had no father, but was himself father of a family: he was in no state of quarrel with any relations; known never to have gamed, which, it is proved, he hated; and he had taken up some former extravagances, and lived more temperately; was his own master; possessed of a fine family seat, with furniture suitable to his rank and figure; £7500 per annum for life, beside present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of £20,000 (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so, and prudence required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother: and this would have been, probably, the opinion of the best and wisest friend he had. None would advise the selling his personal estate, family pictures, &c., which would be *declaring himself bankrupt. The annual profits would not do it, nor would his creditors wait without impatience for it. As to annui- [*440] ties (the way taken by a tenant for life who wants money for particular purposes,) it certainly is not a beneficial way of contracting. It has appeared frequently, that if a man sells an annuity for his own life, so that he wants to sell it, the price is about seven years' purchase, supposing him of middle age and in good health; if he was to buy an annuity for his own life, the same man gives fourteen or fifteen, and in 1743 they went so far as to give sixteen or seventeen, which is a great difference. If there is any objection to the life, they make him abate in proportion. Taking it in the common way, he would get but £7000 for £1000 per annum; taking in the objections to his life, perhaps not £5000. If he was to sell his reversion in fee, or the rever-

sion of £10,000 (the interest of which he had for life,) if he had no younger children, he could have sold them for little advantage; nor could he have got anything for his chance under Lord Sunderland's will. Then his only chance to raise money was this, and it was the most reasonable way, if fairly done and on reasonable terms; and otherwise his goods might be taken in execution and sold for little value, as generally happens.

Next, for the circumstances of the defendant, who is not charged in respect of his character, behavior, or manner of dealing; as, in securities to women, their character must be charged and proved. It would have been material also that he had been acquainted with Mr. Spencer (the contrary of which is proved, as far as a negative can,) or a companion in creating the debt and encouraging it. All circumstances, weighing in other cases, are clear of this. The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it; but afterwards accepted it, on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally, and by [*441] agents, propose these terms to any who would buy; *which were refused by several, only because not advantageous.

The motive has been observed on already.

As to the manner, it is proposed, in the first moment, as a conditional bargain. If it turned out against the defendant, there was certainty of a loss; if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken, for what is proposed is simply accepted.

As to the equality of it as a bargain of chance, whoever deals in or buys lives must have regard particularly to the constitution of the person, manner of life, and age. If the life is bad, the company will not insure at all: all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first: she was of good health, and took care of it; Mr. Spencer the contrary, from his course of life. The insurance offices always go on opinion, and inquire into a general account; so that, if a false account is given in, actions are frequent in Guildhall for the fraud. It is proved, that, notwithstanding advice, he would not alter his course, and said he did not desire to live longer than his constitution would let him. In all these chances, if a man has gone through such shocks to his constitution as he did, they deduct two years' purchase. It was the opinion at that time that he was a bad life; and it appears negatively that it could not be insured at £5 per cent. Taking it on the event, she lived six years after; he survived her but twenty months. Supposing his life was insured at £5 per cent., which is the insurance in case of a person in the best health, on a computation of the value of lives and terms for years, the defendant is gainer about £3000, and might have absolutely lost it, if she had lived many months longer. Interest of the interest, which would then be lost, must be made in all computations. It is so as to the burdens to be borne between tenant for life and reversioner, which is rather too favorable to the tenant for life. The defendant has proved, that

none *would give that, or so much as he did: the plaintiffs have proved nothing of that, which would have been material to show the [*442] value of the contract. The disproportion, then, of the risk will not make it a bad contract: nor does this Court consider bargains in the nice scale of exact equality; nor adopt the rule of the Roman law, by which, if a bargain was one-half under value, it was set aside.

Lastly, his subsequent acts—as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution—would not, perhaps, be of so much weight if they were not consistent with his private opinion: his declarations in private being, that he was honorably and fairly dealt by. The judgment was freely given, and not complained of afterwards: so that, if it could have been set aside originally, it cannot now; and, being in his senses, he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release, indeed, may, like any other contract, be set aside in this court; but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation, for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole v. Gibbons*, 3 P. Wms. 290, the contract had not a possibility of being fair; yet there was no relief, because it was confirmed with open eyes. In *Standard v. Metcalf*, (November, 1734,) the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail, remainder to her uncle and his heirs: she afterwards became a lunatic. The transaction was thought on the face of it to be hard, and an imposition by the uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage: on a bill to set it aside, the defendant insisted it was fair, and that, after the settlement, she by will, to which he was not privy, had given the estate in the same way. Lord Talbot *thought it an extraordinary contract, and unfair, though no proof of fraud, and said, if it depended on the settlement only, he should have [*443] relieved; but the will had confirmed it, which took off that ground to set it aside: on appeal it was affirmed, with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her, if she should become sane, and seek to set it aside. The will did not operate there, but only showed a confirmation. So, but in a stronger degree, does the subsequent act here.

As to the use, in fact, to which this money was applied, it is not material to the defendant to show that, having advanced it bona fide; but what materially distinguishes this from other cases is, that it was applied to the payment of the borrower's tradesmen.

To consider *next* the question of law—whether this contract, as it stood originally upon the bond, is void at law. If so, it is indeed putting it on a clear foundation. Mankind will have a rule for their property, and know the construction of the statute; and it will be needless to argue as to the consequences in this court; for one cannot, with his eyes open, make an agreement

contrary to that statute. As a bargain for a contingency, there is no objection; for all sorts of contingencies are the subjects of a legal contract. Any objection, then, to this, must be on the Statute of Usury, which is not frequent in a court of equity. No contract is a contract on usury within the statutes which was not so before them. By the common, taken from the canon, law a notion long prevailed, that it was not lawful to take any interest for the use of money, which prevails in Roman Catholic countries to this day; and it is astonishing how they should think money might not be a commodity to be used as well as any other. This notion kept that commerce out of the world. In France, they let out money to interest in another shape. Lord Coke, in 3 Inst., labors hard to show, that taking any interest is contrary to nature, and endeavors to prove it also contrary to the law of Moses; but the age is grown wiser, and the law is altered. Any sort of premium was [*444] *usury; now, an illegal premium only. Premium is a word more extensive than interest; and usury is taking a higher premium than the law allows for the use of money. The statute Hen. 8, is an act against usury, fixing the rate of it; which has been followed by the legislature until 12 Anne, and the rate of interest varied; and the sense of all the statutes may be taken together. Perhaps it may be a doubt, whether it is for the public good to have any law fixing the rate of interest, or that it should be like other commodities at market. Locke's treatise upon the consideration of reduction will, at least, make that doubtful. But it must be taken on the statutes, which comprehend only contracts on usury. There must be a principal sum due, and a rate of hire for the use; if it exceeds the proportion fixed, the security is void, and no artificial contrivance shall evade that law: therefore, on pleading the Statute of Usury, it may be proved by any collateral evidence, where it appears not on the face of the contract. Where there is no principal and rate of forbearance, the statute relates not to it. At common law, therefore, when usury in general was forbidden, a contract on condition or peradventure was not within it. Hawkins, C. 82, never disputed as to this point: where the principal may be hazarded really, it cannot be usury. Contracts on bottomry are not excepted out of the statute, yet are clearly not within it from the nature of the contract, the contingency of the ship's returning. So, the discounting notes or bills of exchange is not within the statute, no principal being due which is forborne: so, the buying up of securities at a low rate on the estate of a third person, of which more than legal interest may be made, is not within the statute; so, a wager at odds, which is *Button v. Downham*,¹ so, of casual bargain, *Beddingfield v. Ashley*,² so, *Fountayne v. Grimes*,³ and *Long v. Wharton*.⁴ Insurance, interest or no interest, is barely a wager, and not within it, according to Doddridge, J., in *Roberts v. Treynane*,⁵ and *Sharp-ley v. Hurrel*.⁶ Yet none of these cases but may be turned into such a shift [*445] as may be brought within the statute, if that is the truth of *the agreement; as in bottomry, if it be a mere evasion and no risk.

¹ Cro. Eliz. 643.² Cro. Eliz. 741.³ Cro. Jac. 252.⁴ 3 Keb. 304.⁵ Cro. Jac. 507.⁶ Cro. Jac. 208.

Where the principal is secured, no contrivance can exceed the rate of interest, which, being forbid absolutely, is forbid on contingency. The cases cited for plaintiffs prove only, that, where it is but a nominal risk, it is a mere shift and evasion; as in *Clayton's, &c.*,¹ where the demurrer admitted the corrupt agreement, and there was no objection to the pleading. A stress is endeavored to be laid on words in determining a question of property, from the word "loan," &c.; made use of in this case. If it is a loan within the Statute of Usury, it is material; but a contract on usury is not a loan in its nature, a loan being that which is gratuitous. It is true, there is a difference between a loan not consumed by using, and a loan which is consumed. The first, as of a horse, is called "commodatum;" for lending is not understood to be letting it, if not consumed: the other is to be repaid in weight and measure, and is called "mutuum;" but in its original was gratuitous. But the Court always goes to the substance. What is a loan in its nature cannot be made a purchase by calling it so, nor e contra. This never was proposed in the nature of usury, the original communication being for this contingent bargain: no principal was due, nor rate for forbearance; which there cannot be from the nature of the contract. In bottomry it is called a loan, but not therefore usurious; and there is no difference between this and bottomry, which is admitted to be a hazardous contract, and good; not because it is for the benefit of trade, but that a material risk is run, and to be paid for. So that it turns on this, whether it is a fictitious, colorable contingency to evade the statute; for if it is so it is void, otherwise not. If no bargain can be made of a contingency on a life but what is within the Statute of Usury, it will be a proposition understood by every one. Suppose an action brought, and a plea put in; this could not be considered as a nominal contingency, and to evade the statute.

Next, whether this Court can set aside this legal contract *upon [*446] arguments of conscience arising out of the case, and that in the utmost latitude. The proper jurisdiction of equity is, indeed, to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehavior, (which is not charged or suggested,) or say this ought not to stand. Here is no fraud or overreaching—no evidence from whence imposition is to be presumed; and the amount of the cases cited for the plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another and a very general question has been made of the first impression—viz., supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for, on fraud, there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside; therefore, such a ground of determination is impossible in this Court. There may be a difficulty to tell

what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous when applied to particular cases; and it is, therefore, said, acts of Parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it, and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange-alley were all contingencies; yet it was necessary to have an act to set them aside, although easily proved inconvenient to the public. So, of fair and equal wagers, an act of Parliament, 7 Anne, was forced to interpose. So of gaming—money won at fair hazard, without cheating; this Court never set it aside before the legislature interposed: so that political arguments are never taken into consideration. [*147] The contract of sailors, selling their shares before they knew what they were, could not be set aside here.¹ It is true, there cannot be a more wretched condition than to have the rule of property uncertain, *misera servitus ubi jus vagum*. Lord Digby says, “Set the mark on the door of the house, and let me know that it is wrong, or it is doing it *ex post facto*.” Where the Court has gone upon public convenience, it has been in cases defined and ascertained, which, it is admitted, this cannot be. It is a misfortune that accounts of courts of equity are conveyed to the public in loose notes by persons not concerned in the cause, and mistaken, and that general rules are drawn from particular premises. The Court, in all the cases alluded to, has inferred a presumption; but in all, the presumption may be taken off; it depends on the evidence. If a trustee buys the estate himself, the evidence from his situation is sufficient; he has misbehaved, for he cannot be a check on himself, and does not act fairly; but the presumption may be taken off, as if he agrees openly and fairly with *cestui que trust*, or with the knowledge of this Court.² So, in bonds to lewd women, getting security for nothing: she has grossly misbehaved, and the common presumption is, that she has taken an advantage; but that may be taken off. So, in marriage-brocade bonds: the defendant there has laid such a bias upon himself, that he cannot properly advise; has a power and distress over the party: this is evidence, unless taken off. So, in a private bargain, to give back part of the marriage portion, contrary to the public treaty, it is fraudulent, and a presumption arises of undue advantage, because the father may say he will not otherwise agree; but that may be taken off. Bargains for money, under which offices are procured from one who had the giving or recommending, have nothing to do with this; but there the presumption, from the misbehavior, as the man cannot get the office without it, may be taken off, as where sold with the King’s leave, as commissions in the army: [*448] or a sum of money may be paid out of the trust of an office, *as in *Mr. Bellamy’s case*. Another instance is, the setting aside securities to attorneys pending the business, which was *Walmesley v. Booth*,³ (2d May,

¹ But see *Baldwin v. Rochford*, 1 Wils. 229; *Taylor v. Rochford*, 2 Ves. 281; *How v. Weldon*, 2 Ves. 516.

² See *Fox v. Mackreth*, and note, ante, p. 92.

³ 2 Atk. 27, *Barnard. C. Rep.* 478.

1741,) where Japhet Crook, being prosecuted for forgery, employed the defendant to be his attorney, who was to get bail, money, and probably even evidence for him, and just then procured him to enter into a bond for £1000, for which there was no consideration but for services done. This a court of justice would never suffer, but has relieved on principles of a general nature, that an attorney should not take advantage of his client's distress to get from him what he ought not. This Court and a court of law will, without showing errors, tax an attorney's bill, though settled by the party himself, unless a great acquiescence, or some such matter; it was an unreasonable bargain, and the presumption was from his not being at liberty; but it has never been determined as a rule, that a bona fide attorney may not receive a gratuity over and above, pending the matter. Another rule insisted on this, that mutual bonds to marry shall be set aside by the Court, though ever so fair; yet in *Atkins v. Farr*,¹ (February, 1738,) your Lordship decreed relief on such a bond. That rule was taken from *Woodhouse v. Shepley*;² but your Lordship there said, you gave no opinion what would be the case if the bond was entered into by two persons sui juris, without fathers, or emancipated, having fathers. The ground there was, not that the woman did not know of the bond, which she certainly did; she lived in her father's house, had nothing but from him; they met at night out of the house, and executed this bond: it was held a fraud and imposition on the father, who was made to believe the match was off: it was seducing her from his house, and encouraging her in disobedience: therefore, though she knew what she did, the Court relieved.

Lastly, as to the case of post obits, it is said, where sons, whether in remainder or otherwise, or filius familias, not having a fortune or emancipation of their own, are encouraged in riot and expense, the Court relieves, without evidence, from the particular purpose, because no son, *in the life of [*449] his father, shall make such a bargain: but that is not the ground of relief, for that may be denied, like all other presumptions; from the reason of the thing, it is the misbehavior to persons under this description to share in riot and encourage disobedience; which appears from Domat, under the general title "Loan;" and in another place he says, that, on a bargain with filius familias, under such circumstances there may be relief, under such not; not saying but that a son might, for a portion, even when filius familias, do it. As to which an observation arises on the case determined by Lord Nottingham, who relieved against many of these contracts on particular evidence. Lord North thought he went too far; Lord Jefferies, that he did not go far enough; which is not to be wondered at; for, judging upon circumstantial evidence, they might draw different conclusions. Lord Nottingham's reasons, in manuscript, show, he did not think he was going on the general rule, that a son could not sell a contingency. The case is entitled *Berny v. Pitt*, 2 Ch. Rep. 396. Berny was drawn into several securities for money, to be paid after his father's death, who then was infirm, and kept alive by art; by some he was to pay five for one, and thus was involved in debts to £50,000, or

¹ 1 Atk. 287.² 2 Atk. 535.

£60,000, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares, at an excessive price, as wine, hemp, &c., which could not be sold for a quarter of the price; but the plaintiff, from his necessity, (his creditors being underhand procured to fall upon him,) was willing to get money on terms against which he sought relief. Lord Nottingham first made him pay the principal borrowed, before he would give an injunction, but relieved him as to the rest at the hearing, because, he said, this infamous dealing ought to be suppressed. That the Star Chamber used to punish, and this Court ought to do it; and that no family could be safe if this was suffered. But Pitt prevailed, and the bill against him was dismissed, though he gained about three for one; for it was in the time of his father's health, three *years before his death, [*450] without any circumvention or practice, upon an express agreement to lose the principal if the son died in his father's life; which shows the ground of the determination—relieving against those defendants guilty of misbehavior, yet thinking that a proper bargain might be made by the heir. Lord Jefferies, on the evidence of that case, when before him, laid a different stress, and relieved against Pitt also. From that time there is no case, until *Twistleton v. Griffith*,¹ which turned on the particular fraud and circumvention. *Curwyn v. Milner*,² as cited, is a determination against Lord King's opinion, that he thought himself tied down by precedents; but, if it had been entire, he might have been of a different opinion; and, in the note in 3 P. Wms., it is misstated "and" instead of "or." It is going a great way to say, there can be no case where a son could sell a reversion, where the presumption is taken off. Presumption is evidence but until the contrary proved. This is not the case of a son; but of one, master of his own property. *Cujus dare, ejus disponere*. The principle is too large, that this is to be set aside because of a want of money on one side, that holding in every bargain. Then as to the prospect of gain on the other, it is a laudable motive, provided they act honestly. He was under no more necessity than any man may be presumed to be who sells his estate, and cannot therefore come into equity to set it aside, because he wanted money to pay debts, and would not otherwise have sold it. The ground of common recoveries is to enable people to discharge debts by sale of estates. If it is to be set aside as being an expectation from a grandmother, the Court must go into very minute circumstances. As to the Court's relieving upon general principles against annuities for life of the seller, the Court never laid it down that such annuities simply were bad. *Lawley v. Hooper*,³ was on particular grounds; the plaintiff was in gaol at the time, and fraud infecting the whole; but the Court did not say, no annuity shall be allowed that a man sells for his own life; if so, there is an end of all insurances on lives. The reasoning* in **Batty v. Lloyd*, 1 Vern. 141, was [*451] never contradicted. There would be great difficulty, was one not allowed to sell such things, and turn into money, but must starve ob hæredis causam. Contracts for contingencies have been admitted; *Beckley v. New-*

¹ 1 P. Wms. 310.² 3 P. Wms. 293, n.³ 3 Atk. 278.

land, 2 P. Wms. 182; and in *Hobson v. Trevor*, 2 P. Wms. 191, a contract for sale of an expectancy was even carried into execution. In *Whitfield v. Fausset*, 1 Ves. 387, 1750, a mere possibility was sold by the heir, nothing vesting in the life of the father and mother; and yet your lordship decreed a further assurance by the heir; which, if an illegal contract, would not have been done. So, where an officer, going abroad, assigned his future pay,¹ a bill was brought to stop the money in his agent's hands; it was argued, such assignments were not to be endured, because uncertain and against the public service, and should be discouraged, as spending one's estate before he has it; yet the Court thought every one might dispose of his property, and decreed it because not unconscionable, though that was a contingency and possibility; equity going further than the law, which allows as contracts, but equity as conveyances. But what is this public good which is not to be defined? Is the end proposed by this, that none shall spend above his annual income? That is not to be secured in human nature, or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation?—for that effect it will have, which is contrary to the principles of the constitution of the legal part of the government; the later books, for perhaps 200 years, giving a reason why the Statute de Donis is not to be kept and preserved, that mankind may apply their property to pay their debts; and judges have said, there is great inconvenience in people not being able to sell their own estates. Is the end proposed, that a man may raise money on easier terms if this is set aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair honest men, he will go into the hands of knaves, who will make him pay for *running the risk of the law, and insist on more, when it is understood that he could not make a contingent bargain. [*452] This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and, therefore, no ground to set it aside on political motives. As the law cannot find out a general rule to proceed on, much less will this Court; and, in every case where equity cannot relieve, it is not fit to be relieved.

February 4, 1750–1, the Court delivered their opinion. Absente, Willes, C. J.

BURNETT, J.—Upon the state of this case three points are made.

First, that the original contract is usurious, contrary to the statutes, as being a greater *premium* than the law allowed; and, if so, the new security will fall to the ground, as well as the contract itself.

Next, that, if not usurious, it is so unreasonable an advantage taken of necessity and future expectancy, as the Court is warranted to relieve against as an unconscionable bargain.

Thirdly, that, if the Court is warranted to relieve against this, the new se-

¹ See, however, *Stone v. Lidderdale*, 2 Anst. 533; *McCarthy v. Goold*, 1 Ball & B. 389; *Davis v. Duke of Marlborough*, 1 Swanst. 74; *Osborne v. Williams*, 18 Ves. 379.

curity will be considered as a continuance of the same oppression, and stand in the same light, though entered into after the event.

The other side insist that the original contract is a mere contingent bargain, and consequently not within either the intent or words of any statute. There are no circumstances of a destitute heir or person seduced from parental government; no practice, fraud, or surprise; and that the bargain is equal, taking into consideration the risk run of the principal: and, therefore, the Court is not warranted to relieve, even on the foot of the original bargain. But supposing the Court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himself to be a judge of the equity of the contract, and confirms it with his eyes open.

The case is new, and I shall endeavor to throw my *thoughts into [*453] one connected light, and occasionally take in all the cases cited.

As to the *first* point, whether the loan of £5000, to be paid £10,000 on the death of the duchess, if he survived her, but nothing if he died before her, is usurious, or a mere causal, contingent bargain. I hope I may be excused in calling it a loan; because, although, in a case where the capital is not in all events to be paid, the word may be improper in courts of law, this Court at least has adopted the use of that word in respect of a mere contingent bargain—that of bottomry. If this contract be usurious, it must be either because it is contrary to express words of the statute, or an evasion out of it. It would be mispending the time of the Court to enter into the old notion about usury, and the condemnation of it by canonists, civilians, and some common lawyers, because all those expressions depend on a principle which is out of the present case. The common lawyers differ, there being great opinions either way. Lord Coke seems to call all usury unlawful: 2 Inst. 89; 3 Inst. 151;—but in Hard. 410, Lord Hale says, the Jewish usury only is prohibited by the common law, and the true spirit of usury lies in taking an unjust and unreasonable advantage of their fellow-creatures. But it must be agreed that nothing is legally usurious that is not prohibited by stat. 37 Hen. 8, c. 9, which leading statute is followed by the rest; the 12 Anne, c. 16, varying from it only in reducing the legal interest: the cases determined on the first statute have been, therefore, always looked on as authorities on any of the subsequent. Therefore, to make a contract usurious within the express words of the statute, the reward must be taken for forbearance, or giving a day of payment; and whatever shift is used it will be usury, but not within the statute where it is otherwise. If, in truth, it was a sum advanced by way of loan, and the reward, in truth, given for forbearance, no shift will prevail. I shall better explain myself by the instances I shall put. Supposing there is a purchase of an annuity [*454] at ever such an under price, if the bargain really was for *an annuity, it cannot be usury; but if the communication was about borrowing and lending, it may be usury within the statute: and how? If, by reason of all the circumstances and of the communication, the exility of the sum given, the original contract being a borrowing and lending, the Court thinks the annuity was a mere device to pay the principal with usurious interest to evade the statute, this will be within the statute, though on the face of the bargain it

appears ever so fair a sale of an annuity; the contrivance of the annuity, as the usurious reward of the loan of money, shall not evade the statute made for the benefit of mankind. This I take to be the sum and substance to be collected out of the several cases: Cro. Eliz. 27; 4 Leo. 208; Noy, 151; 1 Brow. 180; and 2 Lev. 7. So, a bargain on a mere contingency, where the reward is given for the risk, not for forbearance, will not be within the statute; but otherwise if the intent was to have a shift, which was Cro. Eliz. 642, 643. If, therefore, a man gives or lends money, not to be paid if the event should be one way, but double if the other, and it is uncertain which way it will happen, it is not within the statute, for the reward is given for the risk, not forbearance; but if, under color of such an hazardous bargain, the real treaty is for a loan, with an usurious reward for that loan, and to evade the statute, the contingency inserted is of little moment, being no ingredient between the parties, the court, or a jury, on the whole, may pronounce such a contract usurious, notwithstanding the color of contingency, if they are satisfied the reward is given for forbearance, not for the risk—as in the adding a single life, which is a healthy life, if that life should survive half a year: so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the statute, whatever colorable contingency inserted; and this is the sense of all the resolutions in the several cases: 5 Co. 69, 70; 2 And. 15; *Mo. 397; and *Mason v. Abdy*.¹ But where the principal was fairly and truly put in hazard, and such as none would run for the interest [*455] the law allows, there is no case where it has been held within the statute. The slightness or reality of the risk seems to be the only rule directing the judgment of the Court: Cro. Eliz. 741, *Bedingfield v. Ashley*; and in 3 Keb. 304, *Long v. Wharton*, which, though inaccurately reported, seems to me good law. I cannot see two contracts bearing a greater similitude than this and bottomry. A life may be insured; so may a ship, which may sink the day after, so may the party die; one is as much an adventure as the other. It was endeavored to distinguish bottomry from every contract upon this, that though above what the law allows upon a loan, yet bottomry contracts were established in favor of trade, there being a risk of the principal, and they being necessary for trade and commerce. But, whatever favor the Court may show to such contracts, they will never establish them upon the destruction of a statute; and the principle of the Court thereon was, that the bottomry bond was not within the statute; nor could it be, for it is plain that a real risk was run, that the principal may never be payable; therefore, it cannot be given for forbearance, but grounded merely on the contingency, the risk. But as a colorable contingency, in case of a life annexed to the payment, may make that bond usurious, so will a colorable contingency annexed to a bottomry contract: as in a bond, if one out of twenty ships, bound from Newcastle to London, arrived safe, that would be a contingency thrown in to evade the statute,

¹ Carth. 67.

which would be too hard for such a bond ; so, if such a contract is made, if the packet should return to Dover from Calais, at a season of the year in which there is no danger : and this I may say with the more security, as *Joy v. Kent*, Hard. 418, is an express proof of it, where a bottomry bond was sent to be tried, whether it was an evasion of the statute, which would not have been so [*456] if it could not have been an evasion. Indeed, Lord Hale throws out expressions very favorable to trade, but so *inaccurate in that book that I do not think they could be such as came out of the mouth of so great a man. His dictums, then, are of no authority. One of the first cases of bottomry which came in question was *Sharpley v. Hurrel*, Cro. Jac. 208. What the Court goes on there is the real risk of receiving less, which is cited again in *Roberts v. Trenayne*, 2 Roll. 47, and Cro. Jac. 508, which differed from the other. In *Soome v. Glen*, as in 1 Sid. 27, the resolution is founded on the real hazard of the principal, which cannot be within the statute. On the whole, therefore, I am of opinion, that this is not a contract founded in its origin upon usury, but a contingent bargain, and consequently, within the express words or intent of none of the statutes of usury.

The *next* point is, supposing it not a contract within the statute, whether it is not such an unconscionable bargain, obtained of an expectant upon his expectancy, as the Court is warranted on precedents to relieve, on paying the sum advanced, with interest from the time of advancing. If it was necessary to give an opinion upon this, I own I should have great difficulty. On one hand I should apprehend it would be too large to say, in no case an heir or expectant could borrow money on his expectancy ; and yet to let him borrow without any advantage to the lender seems to put him under difficulties ; fathers being frequently close-handed, though liberal enough at their death ; so that an heir, if hindered from supporting himself by these means, might starve in the desert, within view of the land of Canaan. On the other hand, I should dread the consequence of giving the sanction of this Court to future bargains. Lord Cowper states the inconveniences of a sanction which had been given. I am sure, it is a point of that consequence to the welfare of mankind, that without necessity no Court will give an opinion of which an ill use may be made. For the plaintiff it is insisted, that there have been many contracts, not illegal or iniquitous in some circumstances, but, from the universal ill tendency or the prejudice to the public, have been always set aside in this Court : instances [*457] of *which were in marriage-brocage bonds, and other contracts of like nature ; and that the ill tendency of heirs contracting with strangers to furnish their wants is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions, and the bringing people together on the worst principles on which men may contract—avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger ; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family ; which tends to a delusion in what is of general concern, the provision for posterity. A man may be giving his estate to a money-

lender instead of the person intended; and every one disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged; and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relations, and when, if he had known the truth, he would have provided for that heir or relations, so as to prevent his beggaring himself. This has been a growing practice to supply young heirs, and the Court has extended its remedy. At first the cases are, where there is express proof of gross practice or actual imposition; from thence it went to cases where, on the face of the contract, it was so gross and unreasonable a contract between the parties, that the Court, on presuming a man would not enter into it but by imposition, has relieved; of which one case among many is *Nott v. Hill*, 1 Vern. 167. As the mischief increased, the Court has extended its remedy. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce to make that contract, there has been relief: the first case of which kind is *Berny v. Pitt*, 2 Ch. Rep. 396; 2 Vern. 14, a very remarkable case, and a stronger there could not be. It is also stated by Lord Cowper, in *Twistleton v. Griffith*, 1 P. Wms. 310, where were marks enough of imposition *to warrant relieving on that foot; but he chose to establish it on the [*458] general principle and Lord Jefferies' decree, not on the particular circumstances of the case; and he seems to rejoice in the consequence, that this would put a difficulty on an heir to borrow on his expectancy. The last case is *Curwyn v. Milner*, 3 P. Wms. 293, n., where Lord King decreed relief; but said, if it was new, he would not have gone so far, where such a contract was fair, and done with open eyes; saying, he thought himself bound by precedents, and that he saw no difference between an estate settled on an heir at his father's death, and an expectancy of personal estate at the death of a relation: it is the same kind of expectancy that tempts to these kind of bargains, and the influence the same.

On the other hand, it is insisted, none of the particular cases cited come within the circumstances of this: that all those of fraud, practice, or imposition are out of the case, it being a bargain sent to market by the borrower, and the terms his own; no destitute heir under parental government having a great personal estate, and so not in the circumstances of the party seeking relief in other cases; the bargain itself different; the risk being different, and the bargain, in all its circumstances, so equitable, that, if the Court should enter into a nice examination of the proportion and risk, it would appear the defendant would have been out of pocket if the grandmother had lived a little longer: that this Court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been instances where such contracts have been carried into execution, as *Hobson v. Trevor*,¹ and *Whitfield v. Fausset*:² that it is a sufficient terror to such contractors, that they are always liable to the examination of this Court: and that they can never stand but on the reasonableness and justice of the contract, which will restrain

¹ 2 P. Wms. 191.² 1 Ves. 387.

one kind of men from preying on the follies of another. These are the arguments on both sides, and there would be danger and difficulty in giving an opinion on either; but there is no necessity for it, that being taken away by Mr. Spencer himself, who has *made himself the judge, by voluntarily [*459] giving a new security.

Which is the *third* point, supposing the Court would relieve against this in its original, whether it will, when altered by the party in the strongest manner, not unapprised, and with his eyes open. There is no case of a contract so confirmed which was not illegal, (but such as the Court would have relieved against in its original instance,) where the Court has relieved against the confirmation; unless obtained by fraud or oppression, and then it has been considered as a continuance of the first oppression; of which there are two cases in Vernon—*Lord Ardglasse v. Muschamp*,¹ and *Wiseman v. Beake*;² but there is no resemblance to the present from either. There was no fraud, practice, or imposition in the original contract or subsequent security. The defendant was not very pressing for his money, the security not being given until a good while after; which shows no suit or distress was threatened, but fairly and voluntarily done, and upon intimation received that the defendant had a doubt whether he could make good the contract in a court of equity. *Cole v. Gibbons*, 3 P. Wms. 290, and the note of the case at the bottom of that, is applicable to the present.

As there is nothing, therefore, to set aside this contract on the foot of usury within the statutes, and next, supposing it was such as would be set aside if left to the consideration of the Court, yet as the party, with his eyes open, has bound himself to execute it, he ought to execute it. It is too much to set it aside; the penalty, therefore, is the only thing which can be relieved against in this case.

Sir JOHN STRANGE, M. R.—There is no occasion to introduce what I have to say with making a particular statement of the case; but as it depends on a variety of circumstances, many of which must be considered in the argument, I shall content myself with taking them up in the course of it.

[*460] *The questions upon which I am to offer my advice are *three*.

First, whether the original advancement of the £5000 in the manner as deposed by Mr. Backwell, and disclosed in the defendant's answer, and the bond taken upon it, are to be considered as usurious, and consequently void in point of law.

Secondly, whether, supposing the bond does not come within the Statutes of Usury, the transaction or bargain in 1738 is of such a nature as will entitle the plaintiffs to be relieved in equity on the circumstances attending that part of the case.

Thirdly, whether what appears to have been done by Mr. Spencer, after the death of the duchess, will in any and what manner influence the determination of this case.

¹ 1 Vern. 237.

² 2 Vern. 121.

As to the *first*, I concur in opinion, that this is not an illegal agreement made void by the Statutes of Usury. The prohibition will stand on the words and meaning of 12 Anne, c. 16, for that does not materially differ from 21 Jac. 1, or 12 Car. 2, and appears calculated for such loans wherein two principal circumstances must concur—agreement to give and receive an allowance of profit in the mean time for the money hired, in a greater proportion than allowed by the statutes; neither of which circumstances occur in the present case. The repayment of the money advanced depended on a contingency, which, if it happened one way, the whole was totally lost; during the pendency of this, no interest or profit could accrue to the defendant, but a mere wager or bargain upon contingency, which died first, so that the whole was at hazard. It is objected, that though the letter of the contract may be so, yet, if the design of the parties was to borrow the £5000, and one should give a greater use for the money than the law allows, putting it into this shape will not evade the statute, in which statute are very general words, to take in all covenants, shifts, &c., which I agree to; and, therefore, if the Court can satisfy itself that this was not in reality a bargain, whereon the *principal was de- [*461] signed to be at hazard, and the shape in which it was put was only a contrivance to evade the statute, it will be usury, and consequently void. Whether the agreement is usurious, or not, may be determined two ways: first, by verdict of a jury on a plea of the corrupt agreement; secondly, by the Courts exercising their own judgment on the circumstances of the case disclosed to them. The first of these methods could not be taken in this cause, because it appears the bond was cancelled upon giving the judgment after the death of the grandmother, and therefore no action could be brought on it; and, if there had been a scire facias at law on the judgment, either against John Spencer or his executors, no plea of the corrupt agreement could be received; the judgment *redditum invitum* not being a contract or assurance, which are the words of the statute; and this was the opinion of B. R. in *Foot v. Jones*, Pasch. 9 Geo. 2; the other method has been often taken, as in *Roberts v. Trenayne*, Cro. Jac. 508. Thus, wherever the Court has seen that the contingency to put the principal in hazard is only added colorably, and only a nominal risk, the Court, to prevent an evasion of the statute, has determined it to be usury; as in *Clayton's case*, 5 Co. 1, and other cases, where the adding the contingency of a particular person being alive at the end of a year was only a shift. So, by Holt, Comb. 125, and Carth. 68. But a wager between two, to have forty for twenty, if one was alive at a future day, would not be usury: Cro. Eliz. 642, *Button v. Downham*: and in 1 Lut. 470, notice is taken of its appearing that both principal and interest was at hazard. The present case is fully before the Court, and proper for the exercise of their judgment. To say it is usury, the Court must be convinced that it was the design of the defendant to make a loan of this, and to secure exorbitant profit for it, and calculated as a shift to evade the statute. But I cannot think, either from the evidence or the answer of the defendant, that it was the scheme, or even in contemplation of the party. It appears a mere wager

[*462] which of the two should outlive the *other. The £5000 was actually advanced, not colorably : therefore, none of the cases cited prove this to be within the Statutes of Usury, or warrant the Court to declare it void thereon. The word “lend,” on which some stress was laid, concludes nothing. Every advancement of money on bottomry is a loan, and it was properly observed to be called so in the acts of Parliament ; but it is the nature of the agreement and intent of the parties into which the Court must look to determine the question. Cro. Eliz. 642, puts it entirely on the question, whether it was the intent of the parties to be a wager or a loan at interest. So in Mo. 398, it has been argued, that lending money on bottomry, when more is taken than the legal interest, is grounded on the consideration of the profit to trade ; and, therefore, it is said not to be applicable. That certainly has been one reason why so large a profit for the use of money has been allowed in that instance ; but the general reason has been, the not coming within the intent of the statute ; for, if it had, the Court could not depart from it : but the hazard the lender runs, of never seeing a penny of his principal, or any of the interest, takes it out thereof ; and that holds as strong in the present case ; and is so laid down in general, where the principal and interest is in hazard : 1 Sho. 8, *Mason v. Abdy* : and in Sid. 27, a diversity is taken between a bargain and a loan, whether a hazard, or not, is considered as the rule for determining whether a bargain or loan. I am of opinion therefore, this bond does not come within the Statutes of Usury, and cannot be declared void at law thereon.

On the *next* question, as the advice I shall offer will be grounded entirely on what was done by Mr. Spencer after the death of the duchess, was I to suppose, for argument’s sake, the plaintiffs were entitled to the relief prayed, I shall offer nothing as a determination of that branch of this case, though it may not be improper to throw out something in general. I see no reason to quarrel with the principal cases cited as the ground for the interposition of a [*463] court of equity. On the contrary, I cannot help *declaring I concur with those determinations, and do not mean in the least to abate the force of them. In the present case there are certainly many circumstances that cast a favorable light on the defendant’s part of the transaction. He does not appear to be a person having an intent of fraud. The scheme¹ moved not from him, but from Mr. Spencer, on whose own terms the money was advanced without any haggling on the part of the defendant, after it was refused by others as not a desirable contract on the calculation of chances. Not that the hands of the Court are tied up from relief from the want of fraud or imposition. I have no jealousy of anything of that in this case. Yet cases may be wherein this Court would interpose to prevent improvident persons from spending or ruining their estates before they come to them, though no proof of actual fraud or imposition ; which is agreeable to the saying of Lord Jefferies, in *Berny v. Pitt*,² when he reversed Lord North’s decree. So it

¹ See also *Townsend v. Lowfield*, Belt’s Supp. to Ves. 31. But it seems such a circumstance ought to have little weight : *Evans v. Chesshire*, Belt’s Supp. to Ves. 300, 306.

² 2 Vern. 14.

was considered in *Twistleton v. Griffith*,¹ and in *Curwyn v. Milner*.² The necessity must be seen by every wise and considerate person. The Courts keep a strict hand over these agreements, which must, indeed, all stand on their own particular circumstances; and, perhaps, it is not advisable to lay down any general rule about them, or more than is necessary to the relief in each particular case.

Therefore, without offering any advice on the bond in 1738, abstracted from the subsequent transaction, I will proceed to the *third* question; upon which I am of opinion, that the plaintiffs are entitled to no other relief against the bond and judgment in 1744, but, as to the penalty, on payment of what remains due, and the interest from the death of the grandmother: and though I have given no opinion upon the former part of the transaction, yet I must take up this, as considering the plaintiffs entitled to the relief prayed, as the case stood on the first agreement. And here it is not improper to take a short view of the different situation in which Mr. Spencer appears in 1744, from what he was in 1738. When the first bond *was given, he was, notwithstanding a large income, involved in great difficulty for want of money to [*464] pay creditors, casting about every way for a present supply, and suffering dangerous schemes to be privately hawked about, fearful lest it should come to his grandmother's ears that he was mortgaging his expectations from her. It is not very clear who took the first step toward the new engagement after her death; the bond was not given until near two months afterwards, though dated the next day after, in order that it might carry interest from thence. But supposing the defendant had called on Mr. Spencer for his money before the 31st of October, (which, from his genteel behavior in other parts, I can hardly think he did,) yet there is no circumstance of force on Mr. Spencer; and the security then standing out against him, was only a bond for payment of the money, not a judgment on which immediate execution could be sued; which bond would have given him time enough to turn himself about, before he would be under a necessity to be exposed to an execution. It appears to be his fixed design, after her death, to pay off the whole as fast as he could, and that with a preference to the defendant, who, he said, had treated him like a gentleman. The defendant declared he would not press him for his money, although he should be glad to have it; and Mr. Spencer executed the bond and warrant of attorney freely and voluntarily, and well pleased therewith. It may be said that all this proceeded from his not being apprised that there could be relief in equity against the first bond. In *Cole v. Gibbons*,³ the bill for relief and the answer, were both read to the party, and yet the assignment was confirmed; which circumstance, greatly weighing with Lord Talbot, is not wanting in the present case; it is what the defendant himself may make use of on his part, and it will be evidence for him, viz., that he answered to the manager of Mr. Spencer that he doubted whether the security would be good, and therefore only desired a note or memorandum; so that, from this doubt of the defendant, Mr. Spencer was apprised of the possibility

¹ 1 P. Wms. 310.² 3 P. Wms. 293, n.³ 3 P. Wms. 290.

[*465] of relief he had, if he applied *to a court of equity; which shows he acted with his eyes open in this article of confirmation—that it was not a sudden, but deliberate act, and agreeable to that frame of mind he continued in to his death, as appears from his subsequent letters.

Contracts of post obits are to be discouraged; and though the relief is not granted in the present case, yet should the Court hold a strict hand over these sort of contracts. How this would be in the case of a young heir under parental authority I do not say. It may be improper to forejudge such a cause; but inconvenience there can be none in the determination of this. Yet, in giving my opinion and advice in this very particular case against relieving the plaintiffs, I am far from blaming the plaintiffs, who are trustees for the infant, for submitting the case to the consideration of the Court, which I think very rightly done.

LEE, C. J.—The *first* point is, whether, on the evidence before the Court relating to this transaction, there is sufficient appearing to determine this contract to be usurious. As to the nature of usury, considering it at common law, or in the law of nature, or Divine law, or the civil law of other countries, (of which there is a large account in Pal. 291,) it is unnecessary to spend time on that subject, because the idea of usury is fully settled in this country by the legislature, which has made use of all the words the language could furnish to prevent taking more than the legal interest, in which usury consists; and, to attain this end, the borrower is at liberty to disclose every circumstance in his contract, that it might appear whether there was any shift, &c. It appears, by 2 And. 15, and *Mason v. Abdy*, Carth. 67, where the difference is taken and settled, that, where the hazard of losing the principal is but a colorable contingency, the agreement is usurious; but where the contingency is real and forcible, it is otherwise. I think that is the material consideration and the substantial and true reason that bottomry bonds are not considered as usurious on the *construction of the statute itself, there not being [*466] words in the statute to reach bottomry bonds when they run a desperate contingency of winds, seas, and enemies, the reasons touching trade not being the true reasons, although they might be inducements to Courts to construe the statutes in a favorable way. So, if on advancement of money by way of loan, the lender will, by an agreement between the parties, in whatever manner formed, have the repayment of the principal, with profit exceeding the legal interest; that will be corrupt within the Statute of Usury. If, therefore, two persons speaking together, one desire £100, and for the loan will give more than the law allows, and for evasion of the statute a practice is invented that the borrower shall grant to the lender £30 per annum for so many years, this practice is within the statute, and will be usury, although the lender never has his £100 again; for by this bargain by way of loan he has full satisfaction for his £100, and more profit than the law allows; which is 1 Bul. 36, which brings the present case to the single consideration, whether the hazard the defendant ran of losing the whole principal, without satisfaction for the money advanced, was not a real hazard, which might require

a reward beyond the legal and common interest; and where that is the case, it appears, from all the authorities, that all bottoms on this in Courts of law—that it is always thought, where the profit the lender is to have is as a reward for the hazard he is subject to, and not for the forbearance of the day of payment, (which are the words of the statute,) they are not usurious. In Molloy, 314, 317, it appears these real contingencies are not within the Statutes of Usury on this foundation.

But, on the *second* point, I think it will be well worth the consideration of a court of equity whether they will not interpose in case of these hazardous bargains to pay double so as to prevent the lenders going away with such an exorbitant gain. It is difficult to form any general rule that can meet every case of this kind that may happen; but they must in general be governed by the *circumstances in each case: only this may be always proper to be attended to, as far as may be, to bring all contracts that are in nature [*467] of loans to that mean prescribed by Parliament, that none take more than the legal interest; and by the cases cited and stated in courts of equity, it appears they have used a sagacious attention to discover whether there is any fraud expressed, or, from the nature of the transaction or person concerned, anything carrying on the face of it an appearance of imposition; as, in the case of young heirs, &c., a court of equity has disabled from taking advantage thereof, and interposed to prevent unconscionable bargains. That, therefore, is a matter worth the regard of a court of equity, so as to prevent all trade of this sort, such as is called Jewish interest, which seems a *malum conusabile* at common law.

What has been done by Mr. Spencer, after the death of the duchess, prevents the Court from entering minutely into the consideration of the first contract; for any objections thereto are taken away by himself, in whose place the plaintiffs stand. The first contract, surely, might recover strength, and be validated by the intervention of a new case that was fit to create a right. If he was under apprehensions of his grandmother when the first security was given, yet they were at an end at the last. If he was an infant when he gave the first bond, the contract would be voidable as to him; but if, when of full age, he gave a new bond, it would be good against him. In the case in Dom. 136, called the Macedonian decree, it is said, that if any creditor lent money for a just and reasonable cause, sufficient to support the equity of the obligation, it was, by a favorable interpretation of the decree of the senate, excepted from the general prohibition, according to the quality of the use to which the money was put. The defendant has this exception in his favor—the use of his money being to pay just debts to tradesmen; for if these contracts are to be set aside upon the hatred to the creditor who has made an improper loan, yet that imputation is taken away: and even in the case of a son, if the father approves or ratifies the obligation by paying part, or the *son acquits [*468] it himself, it cannot be revoked: Dom. 137, 138, in his observations upon that decree. But it is said, that though Mr. Spencer was not under the same difficulty when he gave this new security as at the giving the first bond, yet he was a debtor then to the defendant, and liable to be called on by lega

proceeding; but that cannot be a reason to set aside this deliberate act of Mr. Spencer, against whom there was then no process, but a readiness in his creditor to take paper security instead of money, which he had a right to. I rely on 3 P. Wms. 290,¹ as a stronger case than this, being a deliberate act confirming an unreasonable bargain when the party was fully informed of everything, and under no surprise: that made it good. In *Cann v. Cann*, 1 P. Wms. 727, Lord Macclesfield says, there is no color to set aside a release which the maker had a right to make, and was not ignorant of his right, and that solemn conveyances are not slightly to be blown over. I entirely concur, therefore, in opinion.

LORD CHANCELLOR HARDWICKE.—Before I proceed to give my own opinion in this case, I must take notice that Lord Chief Justice Willes has signified to me his entire concurrence on these three points.

Next, that the great and able assistance I have had in this case has made my task extremely easy; and, as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking up any time. One thing I ought to say in the outset—that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the judges the trouble of this attendance. As three points have been properly made at the Bar, it is necessary to say something to each.

The *first* is a mere question of law upon the Statutes of Usury² and on the rules of law, and the same as in a court of law, if an action had been brought on the bond, and the whole matter had been disclosed in special pleading. [*469] *If I had even now a doubt concerning it, I should have held myself bound by the opinion of the judges, as a matter within their conscience, in like manner as if I had sent this to be tried at law; in which case the Court always decrees consequentially to the trial. But I have no doubt about it, and concur in opinion. This question was labored by the plaintiff's counsel; many authorities cited; strong inferences made by them. I do not intend to go through them; but contracts on contingency are to be distinguished plainly, for a wager on chance is not within the statute, because no loan. But if there is a loan of money, with an agreement to receive back more than the principal and legal interest in any event, there, though a contingency is thrown in, on which the whole principal and interest may be lost by possibility, it is usurious, and contrary to the statute. On this it was insisted for the plaintiffs. I will not now enter into a critical dispute how far any such contract, where, by the falling out of the contingency one way or other, the money may be lost, is in strictness a loan. The civil law has very nice and refined distinctions upon this; "*commodatum*" and "*mutuum*" are there technical terms for a loan. By the first was meant, where the things lent were to be restored *in specie*; by the second, where *in genere* only: but in both the things

¹ Cole v. Gibbons.

² The laws against usury are now abolished. See 17 & 18 Vict. c. 90.

were to be restored in all events, and nothing was to be paid for the use or hire; which, when it was so, was “*locatum*” and “*conductum*,” by the Roman lawyers, under which, perhaps, all our laws would strictly come. But these minute distinctions upon loans are not adopted by us; but we mix and confound their “*commodatum*” and “*mutuatum*,” as appears in an action upon a loan, which takes in both. So, though interest is to be paid for it, it is with us still a loan: so, though money is to be advanced upon a risk, which upon a contingency may be totally lost, it is still a loan of money; and all the books treating of bottomry call it money lent on bottomry. Besides, this is plain by the express words of the stat. 11 Hen. 7, c. 8, which shows they understood that an adventure might be inserted in a *contract of a [*470] loan; and it is observable that this, if real and fair, exempted it from the laws of usury; though at that time all kind of usury, or taking interest, was unlawful. By the law of England, therefore, the insertion of a contingency will not of itself prevent a contract being a loan. Consider the result of the cases cited on the Statutes of Usury, which I will not repeat, but only deduce proper and natural inferences from them. *First*, if there is a loan on contingency, in consideration whereof a higher interest than the law allows is contracted for forbearance, if the risk goes only to the interest or premium, and not to the principal also, though real and substantial risk is inserted, it is contrary to the statute, because the money lent is not in hazard, but safe in all events; and no regard is then had whether the contingency is real or colorable, as appears from what Doddridge, J., says in *Roberts v. Trenayne*;¹ who, by the way, takes it for granted that such a loan may be with us on contingency. *Next*, if the contingency extends to both, and there is a higher rate than the law allows, regard is had, whether a bona fide risk is created by the contingency, or whether only colorable; for, if so, courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself: *Clayton's case*, 5 Co. 70; and in the case put by Popham in *Burton's case*,² immediately preceding. So in *Mason v. Abdy*. But where the contingency has extended to principal and interest both, and not colorable only, but a fair and substantial risk is created of the whole, it takes it out of the statute: though called a loan, it is considered as a bargain on chance, and differs little from a wager. On this depends the case of bottomry; for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into consideration, but not alone relied on to support usury, for that cannot be. The plaintiff's counsel object to this, by laying stress on certain expressions and dictums of judges in some cases, that there must be no *transaction or communication of borrowing and lending; and care [*471] must be taken that there be no such: and, therefore, as the first proposal in the present case was to borrow money on a contract to pay two for one, it is usurious, notwithstanding the contingency thrown in. A very right answer has been already given, that courts of justice are to regard the sub-

¹ 2 Roll. 47; Cro. Jac. 508.² 5 Co. 68.

stance of things on a contract, and not mere words, which might be inaccurately used by the parties in private dealing. But another answer may be given—that in the most accurate books these expressions are applied to cases arising on purchase of an annuity, or sale of goods and merchandise, at a premium or advanced profit beyond the rate of legal interest; in which cases these expressions are properly applicable, but cannot be so to loans on contingency—that is, a fair, real contingency; for there, from the nature of the thing, the communication must be about a borrowing and lending, as is plain from the case of *bottomry*; and the case put by *Doddridge, J.*, in terms, is of lending £100, &c., upon a casualty: if it goes to the interest only, and not the principal, it is usury; which he clears by the case of *bottomry*. The very stating of the case on the purchase of an annuity or sale of goods proves the truth of this. An annuity may be purchased at as low a rate as you can, provided it was the original negotiation to purchase and sell an annuity; but if the treaty began about borrowing and lending, and ends in the purchase of an annuity, it is evident that it was only a method or contrivance to split the payment of the principal and usurious interest into several instalments, and consequently that it was a shift; which is *Fuller's case*, and *Tanfield's case*, 4 Leon. & Noy. 151, which I take to have been on the same deed as that in 1 Brownlow. So, in the sale of goods or merchandise, it is lawful to sell as dear as you can, on a clear bargain by the way of sale; but if it is first proposed to borrow, and afterwards to sell goods beyond the market, this is usurious; of which there are two cases in Mo. 397. The very putting these cases shows how proper and forcible those expressions of the judges before mentioned are, [*472] *when used in the purchase of an annuity and sale of goods; but how improper when thrown out in cases of loans of money on contingency.

The *second* question is, supposing the first contract to be valid in law, whether it was contrary to conscience, and to be relieved against in this Court upon any head or principle of equity. I will follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it; yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are vicia temporis, and pernicious in their consequences; and then it is the duty of a court, if it can, to restrain them.

This Court has an undoubted jurisdiction to relieve against every species of fraud.

First, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscientious bargains; and of such even the common law has taken notice: for which, if it would not look a little ludicrous, might be cited *James v. Morgan*, 1 Lev. 111.

A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed: but it is wisely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

A fourth kind of fraud may be collected or inferred, in *the consideration of this Court, from the nature and circumstances of the [*473] transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage-brochage contracts, neither of the parties herein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So, in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do; but, if there is fraud therein, the Court holds it infected thereby, and relieves. So, where a debtor enters into a deed of composition with his creditors for 10s. in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor, to induce him to sign this deed, that he will pay, or secure a greater sum in respect of his particular debt—in this there can be no particular deceit on the debtor who is party thereto, but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor. This Court, therefore, relieves against all such *underhand bargains*. So, of premiums contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having the legal appointment of these offices are or may be deceived thereby: or if any person, agreeing to take the premium, has authority to appoint the officer, it tends to public mischief, by introducing an unworthy object for an unworthy consideration. These cases show what courts of equity mean when they profess to go on reasons drawn from public utility. To weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of courts of justice. This was showing the thing in the light which best served the argument for the *defendant, but far from the true one, if the word “politics” is taken in the common acceptation; but if in its true original meaning, it [*474] comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a court of equity founded on public utility. Particular persons, in contracts, shall not only transact bona fide between themselves, but shall not transact mala fide in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the

rest of mankind, beside the parties contracting, are concerned, it is properly said to be governed on public utility.

The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, &c., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against Pitt, there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir, or expectant, has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave [*475] his estate, not to his heir or family, *but to a set of artful persons, who have divided the spoil beforehand.

Consider which of these species is in the present case. There is no color of evidence of actual fraud in the defendant, who did not think he was doing anything immoral or unjust; although, if the declarations of Mr. Spencer can be believed, the defendant had a misgiving how far it could be held good in this Court. But though this case is clearer of actual fraud than almost any that has come, yet several things are insisted on for the plaintiffs—as necessity on one side, and advantage taken of it on the other; unconscionableness in its nature, from the terms of paying two for one, in case of the death of an old woman, the next week or day; that there was deceit upon her, who was in loco parentis, from whom were his great expectations. This was, however, the thing intended. I admit, also, there are more circumstances alleged on the side of the defendant, to weaken and take off, than have concurred in most cases of this kind. Mr. Spencer was of the age of *thirty*; possessed of a great estate of his own; not weak in mind, but of good sense and parts—though in that the witnesses differ. If it was necessary to give an opinion upon this point, I should consider the weight of these objections, and the answers to them; but as it is not, I will only consider the contingency inserted, which was to cure the whole.

I would not have it thought that the insertion of such a contingency would in every case sanctify such a bargain. Suppose such a bargain made by a son in the life of his father or grandfather, on whom was his whole dependency; I appeal to every one, what the consequence of it would be. Whether such a contingency is inserted or not, it will come to the same thing, the creditor knowing the fund for payment must depend on the debtor surviving the father or grandfather, whether it is said so or not; and therefore I have always

thought there was great sense in what Vernon reports to be said by the Court in *Berny v. Pitt*, "that the expressing the death of the son in the life of the father makes the case worse."

*I have not mentioned the reasons drawn from the discouragement of prodigality, and preventing the ruin of families—considerations of [*476] weight, and ingredients which the Court has often very wisely taken along with them. It is said, for the defendant, to be vain and wild for the Court to proceed on such principles. If it had been said it was ineffectual in many instances, I should have agreed thereto; but I cannot hold that to be vain and wild which the law of all countries, and all wise legislatures, have endeavored at as far as possible. The senate and law-makers in Rome were not so weak as not to know, that a law to restrain prodigality, to prevent a son running in debt in the life of his father, would be vain in many cases; yet they made laws to this purpose, viz., the Macedonian decree, already mentioned; happy if they could in some degree prevent it; *est aliquod prodire tenus*.

It is said for the defendant, that this would be to assume a legislative authority, and that several Acts of Parliament have been thought necessary to restrain and make void contracts of a pernicious tendency to the public. What can be properly called such an assuming in this Court I utterly disclaim; but, notwithstanding, I shall not be afraid to exercise a jurisdiction I find established, and shall adhere to precedents. As far, therefore, as the Court went in *Berny v. Pitt*, in *Twistleton v. Griffith*, in *Curwyn v. Milner*, and the opinion of Lord Talbot on the original transaction in *Cole v. Gibbons*, so far, and as far as these principles do naturally and justly lead, I shall not scruple to follow. The Acts of Parliament instanced will be found to be made, (many of them,) not for want of power in this Court to give relief in many of these contracts, but to make them void in law, to give the party a short remedy against them.

The judgment I am going to give will not be founded upon this: but I have done it that the work of this day may not be misunderstood, or precedents thought to be shaken: not that this establishes such a contract as is called fair, like killing fairly in a duel, which the law does not allow as an excuse for murder. *Junct annuities* and **post obits* are grown into traffic, [*477] which ought to abate of its fairness.

As to the *last* question, of the subsequent acts of Mr. Spencer: this is the point on which the determination of this case will depend, and I entirely agree with the opinion delivered already. Had the first bond been void by the Statutes of Usury, no new engagement would have made it better; the original would have infected it. But if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief, which might be had in this Court. The material inquiry is, whether this was done, after full information, freely, without compulsion, &c.; and upon the best consideration of the evidence, it appears to be so done, and with fairness.

First, the condition of the necessity of Mr. Spencer was over: for though he had no power over the capital of this accession of estate, yet it was so great

a one, that little more than one-third of a year's income would have paid off the whole. If that, then, be a state of necessity, how far shall it be carried?

Then the state of expectancy was over by the death of the duchess, and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, which was the principal restraint upon him; so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement; and it appears, that, before this new bond, he had sufficient notice that he had a chance, at least, that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good.

Lastly, there was no impediment against his seeking relief by disclosing the whole case at that time in a court of justice.

Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in, which operates more strongly than the [*478] deed of confirmation in *Cole v. Gibbons*, that it is too much to set it *aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee: here Mr. Spencer was debtor,¹ and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs, that *Cole v. Gibbons* was a single case; and there are several precedents in which such new security and subsequent transaction was not sufficient to give a sanction to a demand of this kind, as in *Lord Ardglass v. Muschamp*; but the circumstances there show it not to be at all applicable. Then the confirmation in *Wiseman v. Beak* was still more extraordinary; and that was a very extraordinary invention of Serjeant Philips, of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent; but I have only shown it here to be a doubtful object of relief in this Court, which surely is the most proper case of all others to put an end to by a new engagement.

On the whole, therefore, the only relief is that which I am advised to give against the penalty of the last bond.

The only doubt which could arise on this is as to costs, to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favor, and were in the right to submit it to the judgment of the Court; and it is observable, that in *Cole v. Gibbons*, which was on this point, the bill was dismissed without costs, and no costs given on the bill, but, on the contrary, deducted. There was, indeed, in that case, no penalty, as there is here; but still that does not take away the discretion of this Court in respect of costs, according to the circumstances of the case: and there are several cases of a bond with a penalty disputed, where, though the costs at law will undoubtedly follow the demand, yet, on the circumstances, costs in this Court are refused.

[*479] Therefore, let it be referred to the Master to take an *account of the principal and interest due on the bonds of 1744, and the judgment

¹ See *Fox v. Mackreth*, ante, p. 123.

thereon, and to tax the defendant his costs at law, and an account of the money paid by Mr. Spencer to the defendant; and let that first be applied to discharge the interest, and then to sink the principal, and all just allowances be made; and, on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs. And, if the plaintiffs pay what is so found due, let there be no costs in this Court on either side; but, otherwise, let the bill be dismissed with costs.

Chesterfield v. Janssen, is a case of very frequent reference, celebrated alike for the able arguments of the counsel on both sides, and for the opinions of the learned judges who assisted Lord Hardwicke, but above all for the elaborate and learned judgment of Lord Hardwicke himself, in which he has so admirably classified the different species of frauds against which equity will give relief.

It is proposed in this note to consider only the last head of frauds mentioned by Lord Hardwicke—viz., that which infects catching bargains with heirs, reversioners, or expectants. “These,” observes his Lordship, “have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud *presumed or inferred* from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. . . . In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.”

*Before, however, entering upon this important subject, it may be [*480] remarked, that mere inadequacy of price, unless it be the result of fraud, surprise, or misrepresentation, (*Pickett v. Loggon*, 14 Ves. 215; *Reynell v. Sprye*, 8 Hare, 222; 1 De G. Mac. & G. 660,) is not a sufficient ground to set aside a purchase of *interests in possession*, but the inadequacy may be so gross as to be of itself clear evidence of fraud. “To set aside a conveyance,” says Lord Thurlow, “there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it:” *Gwynne v. Heaton*, 1 Bro. C. C. 8: and see *James v. Morgan*, 1 Lev. 111; *Stilwell v. Wilkins*, Jac. 280; *Rice v. Gordon*, 11 Beav. 265.

But, with regard to expectants and reversioners, the authorities clearly show, even in the absence of the different species of frauds which, as before observed, are frequently ingredients in such transactions, that mere inadequacy of price

is a sufficient ground for rescinding contracts or dealings with them for their expectancies or reversionary interests. Thus, where an heir borrows money upon a post obit bond or otherwise upon a mere expectancy, or sells it, a court of equity will set aside the transaction if it is unreasonable, or the price is inadequate: *Curwyn v. Milner*, 3 P. Wms. 293, n.; *Peacock v. Evans*, 16 Ves. 512.

The rule is also applicable where the expectancy is an interest in remainder, after the death of the father or any other relation: *Freeman v. Bishop*, 2 Atk. 39; Barnard. Ch. Rep. 16. Thus, where a son, tenant in tail in remainder, has, during the life of his father, sold his interest in the estate at an under-value, the sale has been set aside. See *Nott v. Hill*, 1 Vern. 167; 2 Vern. 27; 2 Ch. Ca. 120; 2 Cox, 80, cited; *Twistleton v. Griffith*, 1 P. Wms. 310. So, likewise, where a reversioner has mortgaged his estate or has granted an annuity, or has given a bond or other security for the payment of a sum of money or an annuity at the death of his father, the transaction will be set aside if it appears to be unreasonable, or the price inadequate: *Barny v. Beak*, 2 Ch. Ca. 136; *Wiseman v. Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Berny v. Pitt*, 2 Vern. 14; 2 Swanst. 142, n.; 2 Ch. Ca. 391; 2 Ch. Rep. 396; 1 P. Wms. 312, cited; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Gowland v. De Faria*, 17 Ves. 20; *Evans v. Cheshire*, Belt's Supp. to Ves. 300.

Mr. Swanston, in his learned note to *Davis v. Duke of Marlborough*, 2 Swanst. 140, seems to think that, in order to constitute a title to relief, the reversioner must also combine the character of heir; and he observes, "that [*481] the reversionary interests, the sale *of which had been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every case except the following:—*Wiseman v. Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Cole v. Gibbons*, 3 P. Wms. 290, (on the original transaction in which, unconfirmed, Lord Talbot considered the plaintiff entitled to relief;) *Barnardiston v. Lingood*, 2 Atk. 133; S. C., Barnard. Ch. Rep. 138; *Bowes v. Heaps*, 3 V. & B. 117;—they were expectant on the decease of the reversioner's uncle, and in *Gould v. Oakden*, 4 Bro. P. C. 198, Toml. ed., on the decease of the wife's father. But in all these cases the sale had been transacted while the vendor was in distress."

In nearly all these cases, it is true, distress actually exists; but the modern authorities show, that, as distress or inequality is always *presumed* to exist, the onus lies upon the person dealing with a reversioner or expectant, even although he does not combine the character of heir, to show that the transaction is reasonable, or the price given adequate, (*Gowland v. De Faria*, 17 Ves. 70; *Woodroffe v. Allen*, 1 Hay. & J. 73; *Bawtree v. Watson*, 3 My. & K. 339; *Edwards v. Browne*, 2 Coll. 100; *Sewell v. Walker*, 12 Jur. 1041; *Davies v. Cooper*, and *Cooper v. Jackson*, 5 My. & Cr. 270; *Addis v. Campbell*, 1 Beav. 258; *King v. Savery*, 1 Sm. & Giff. 271; 5 H. L. Cas. 627; *Edwards v. Burt*, 2 De G. Mac. & G. 55; but the Court will sometimes direct an inquiry as to the value: Sugd. V. & P. 315, 11th ed.)

The history and policy of the doctrine are thus clearly commented on by Sir J. Leach, V. C.; "At law, and in equity also," observes his Honor,

“generally speaking, a man who has a power of disposition over his property, whether he sells to relieve his necessities, or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A court of equity, however, will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such persons; but in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose, upon all who dealt with expectant heirs and reversioners, *the onus of proving that they had paid a fair price*, and otherwise to undo their bargains, and compel a re-conveyance of the property purchased. The principle and the policy of the rule may both be equally questionable. [*482]

*Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions, from the pressure of distress, are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them:” 3 Madd. 235. Lord Thurlow, however, fully approved of the principle upon which sales of expectant interests by heirs are set aside. “For,” observes his Lordship, “there is a policy in justice protecting the person who has an expectancy, and reducing him to the situation of an infant, against the effect of his own conduct. The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases; and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed:” *Gwynne v. Heaton*, 1 Bro. C. C. 9.

In all these cases one ground for setting aside such dealings exists in nearly the same degree, viz., that the parties do not meet upon equal terms—there is distress on one side, and greediness of gain on the other: but, where the reversioner or expectant is also heir, there is an additional reason for the interposition of equity—“the policy of the nation to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from dependence on his ancestor, who probably would have supported him, and, by feeding his extravagances, tempting him, in his father’s lifetime, to sell the reversion of that estate which was settled upon him, foreasmuch as this tended to the manifest ruin of families.”—Per Lord Talbot, 3 P. Wms. 293. And where a mere expectant deals with his expectancy, a fraud is committed upon the ancestor or person from whom the spes successionis is entertained. “A man,” to use the words of Mr. Justice Burnett, in the principal case, “may be giving his estate to a money-lender instead of the person intended; and every one disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged; and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relations, and

when, if he had known the truth, he would have provided for that heir or relation, so as to prevent his begging himself."

It may be here mentioned, that a fair agreement between expectants or heirs, to divide the property which may be left between them, or to any one of them, is not contrary to public policy, and will be enforced in equity.

[*483] Thus, *in the leading case of *Beckley v. Newland*, 2 P. Wms. 182, the plaintiff, Beckley, and Sir George Newland, who had married two sisters, the presumptive heirs of Mr. Turgis, a very rich man, entered into articles whereby they agreed, that whatsoever should be by will left to either of them should be equally divided between them. Mr. Turgis, who had made and revoked several wills, at length made a will in favor of Sir George Newland, whereby he left a great personal estate to Sir George. Upon a bill being filed by Beckley for a specific performance of the agreement, it was objected, that the articles to divide a man's estate while he was living, and to share that in which the parties, at the time of making the agreement, had no manner of right, and possibly might never have, were unfair, and not to be encouraged; that it was to disappoint the will of the testator, who in all probability would have given nothing to either of the parties to the agreement, in case he could have foreseen that his disposition would be frustrated as soon as ever he should die. However, Lord Macclesfield decreed a division of the personal estate, according to the articles. "Suppose," he observed, "there were two daughters, and the father should leave almost all the estate to the eldest, and nothing, or very little to the youngest; if there should be such an agreement as in the principal case, surely it would have been no more than what every one would have wished for." See also *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, 2 Sim. 192; *Hyde v. White*, 5 Sim. 524.

If the *bulk* of the property sold be reversionary, the mere fact of a *part* of it being in possession, (especially if colorably thrown into the contract, and it bears but a small proportion to the whole,) will not prevent the application of the rule of equity with respect to sales of interests in reversion: *Davis v. The Duke of Marlborough*, 2 Swanst. 154; *Earl of Portmore v. Taylor*, 4 Sim. 182.

It seems to have been thought at one time, that certain reversionary interests, depending for instance upon marriage and birth of issue, were not capable of valuation, and Sir John Leach, M. R., said, "The probability that a bachelor of sixty-three will marry and have issue, depending upon the peculiar habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation; and I put out of my consideration, all evidence which affects to set a value on that contingency." See *Baker v. Bent*, 1 Russ. & My. 224; *Boothby v. Boothby*, 15 Beav. 213, n.

In that case, however, as the purchaser had first contracted for the reversion without regard to the contingency, and afterwards upon the *discovery of the contingency, had agreed to deduct a certain sum on account of it, his Honor took that to be the real value of the contingency, and upon that assumption directed a reference as to the value of the reversion.

It seems however that the Court would now receive evidence with regard

to the value of a reversion affected by such a contingency, and if the contingency were very remote, no deduction would be made on account of it in estimating the value of the reversion. See *Baker v. Bent*, 1 Russ. & My. 224. And in *Davies v. Cooper*, 5 My. & Cr. 270, where the interest was contingent upon the death of a lady without having had a child who should attain twenty-one, or who should die under twenty-one, leaving issue living at the lady's death; as she was thirty-five or thirty-six at the date of the agreement, and had been married eight years, and had never had a child, and as all the parties, of whom the husband was the principal, did not appear to have attached any importance to that contingency, Lord Cottenham was of opinion, that, in estimating the value of the reversion, it ought to be considered with reference only to her life.

In *Boothby v. Boothby*, (1 Mac. & G. 604,) a reversion expectant on the decease of a tenant for life aged fifty-six without issue, (the tenant for life being married, and his wife being in her fifty-fourth year, and the only issue of the marriage having been a still-born child eleven years previously,) was held by Lord Cottenham, C., (overruling the decision of Sir L. Shadwell, V. C.; 15 Beav. 213 n.,) to be capable of valuation. And upon a reference to ascertain the value of the reversion, which had been sold for £20, it having been found by the master to be worth £350, the sale was set aside: 15 Beav. 212. See also *Sherwood v. Robins*, 1 Mood. & Malk. 194.

Equity will also give relief, especially in the case of an expectant heir, against usurious loans, effected under the mask of trading, where, instead of money being actually advanced, goods are supplied by a tradesman, merely for the purpose of being at once sold, and will in general set aside such transactions upon payment of what the goods produced upon a re-sale, and interest: *Waller v. Dalt*, 1 Ch. Ca. 276; S. C., 1 Dick. 8; *Barny v. Beak*, 2 Ch. Ca. 136; and see *Barker v. Vansommer*, 1 Bro. C. C. 149, in which case a young man, immediately upon coming of age, and wanting to raise money, gave a bond for the price of some silks to be resold by him. "I take it," said Lord Thurlow, on setting aside the transaction, "as an advancement of goods, instead of money to supply his necessities. It is a question of more difficulty what is the sum of which the account is to be taken—whether the *value of the goods, or the sum really made. In the case in Eq. Ab. [*485] 91, the Court thought proper to charge the person only with what he really made of the goods; and this is the proper rule, for the person advancing the goods knows they are not to be sold in the shop, but in the lump, at a different kind of market, and that what can be got for them in that way is all that will redound to the benefit of the party to whom they are advanced: this leaves out of the case the value they were of to be sold in the shop."

However, in *King v. Hamlet*, 2 My. & K. 456, Lord Brougham refused to relieve against securities given by an heir in necessitous circumstances, for the shop price of goods taken to a large amount, and immediately sold to raise money, at a loss on the whole transaction of £60 per cent. The decision in this case was founded principally upon two propositions, which, if sustained by subsequent authorities, will form material exceptions to the doctrine of

courts of equity as to the dealings with expectant heirs and reversioners. "Two propositions," said his Lordship, "I take to be incontestable, as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father, or other person standing in loco parentis—the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be if the father, or person in loco parentis, shall be found to have concurred in this adoption of the repudiated contract. . . . The whole doctrine with respect to an expectant heir assumes that the one party is defenceless, and exposed, unprotected, to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, [*486] and did nothing to prevent *them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and profit by. If all the cases be examined, from the time of Lord Nottingham downwards, no trace will be found in any one of them of the father's or other ancestor's privity; on the contrary, wherever the subject is touched upon, his ignorance is always assumed as part of the case; and its being so seldom mentioned either way shows clearly that the privity of the father or ancestor never was contemplated. It is, however, several times adverted to in a manner demonstrative of the principle. In *Cole v. Gibbons*, 3 P. Wms. 290, the ground of this whole equity is said to be the policy of the law to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit, Lord Cowper, in *Twistleton v. Griffith*, 1 P. Wms. 313, had before stated, as one effect of the law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So, in the *Earl of Chesterfield v. Janssen*, Mr. Justice Burnett treats such transactions as things done behind the father's back, and, as it were, a fraud upon him—a view of the subject also adopted by Lord Hardwicke in the same case. It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new because the facts never afforded a case for decision, the proposition having, apparently, never been questioned." The judgment of Lord Brougham in this case was affirmed in the House of Lords,

3 C. & F. 218; but Lord Lyndhurst, in moving the judgment of the House, merely said that he saw no reason to dissent from the judgment of Lord Brougham in the court below.

Lord St. Leonards, in his learned work on Vendors and Purchasers, p. 316, 11th ed., with great reason, questions the soundness of these propositions. "The first of these rules," he observes, "is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained; the knowledge of the parent may, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. *It is the son's equity*, although partly grounded upon public policy. In many cases the person standing in loco parentis, or from whom the spes successionis is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the *worldly [*487] prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them, (which is simply accomplishing the purpose for which they were bought,) it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction." See also the reasons for the appellant, Sug. V. & P. 1084, 11th ed., and Sug. H. of L. 65. See also *King v. Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627.

What dealings with reversionary interests are unimpeachable.—“The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements;”—Per Lord Eldon in *Tweddell v. Tweddell*, T. & R. 13; and see *Heron v. Heron*, 2 Atk. 160; *Wallace v. Wallace*, 2 D. & W. 452; and in the absence of undue influence on the part of the parent they will be binding: *Bellamy v. Sabine*, 2 Ph. 425; *Firmin v. Pulham*, 2 De G. & Sm. 99; and see the notes to *Huguenin v. Baseley*, and *Stapilton v. Stapilton*, vol. 2.

The sale of a reversionary interest by auction, fairly conducted, will render it unnecessary for the purchaser to show that he has given an adequate price; for the principle of the ordinary rule is not applicable to this case, because as there is no treaty between the vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser; the vendor is in no sense in the power of the purchaser; and, moreover, the sale by auction is *evidence of the market price*. This was first decided by Sir John Leach, V. C., in *Shelly v. Nash*, 3 Madd. 232, who, when it was urged that pretended sales by auction might be used to cover private bargains, observed, “where such cases occur, they will operate nothing.”

Where, however, the sale by auction takes place under such circumstances as to affect the purchaser with notice that he is dealing with a person in such distress that he does not use the ordinary precautions against a sale at an

undervalue, the purchaser will not, it seems, be relieved from the obligation of proving that he gave a fair price. Thus, in *Fox v. Wright*, 6 Madd. 111, where a bill was filed to be relieved against certain post obit bonds, Sir John Leach, V. C., said, "The true effect of the case of *Shelly v. Nash* is, that [*488] every purchaser at a sale by auction of a reversion is not *necessarily bound to establish that he purchased at a full price—that he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought not a reversion, but an estate in possession. The question is, whether the present defendant purchased this post obit bond under such circumstances. The particulars of sale disclose that the vendor was a young man about to raise a sum of £40,000 upon post obit bonds, payable at the death of his father, and that the sale of these bonds was to take place *without reserve*—that is, without any bidding on his part. Those who attended this auction necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the language of the case of *Shelly v. Nash*, whether it can be considered that the vendor is not, in some sense, in the power of those who deal with him; and whether a sale by auction, under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally upon this motion, and I must continue this injunction till the hearing, upon the terms of the plaintiff bringing into court the auction price, together with interest at £5 per cent. from the time of payment."

It is not, however, essential to the validity of a sale of a reversionary interest that it should be by public auction. "For if," as observed by Lord Cranworth, "previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill and having knowledge of the property, and of all the circumstances likely to influence value, a well-considered estimate of what the property would be likely to fetch on a sale, and act on that opinion, we are far from meaning to decide that such transaction could be afterwards impeached, merely because other surveyors should come to a conclusion different from that on which the parties had acted. The Court would, probably, in such a case, be much inclined as a matter of fact to believe the original, and not the subsequent estimates, to be correct; per Lord Cranworth, L. J., 2 De G., Mac. & G. 63.

But where, upon the sale by private contract of a reversionary interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a [*489] suit to impeach the sale, the purchaser *was unable to show that he had given the full value, the sale was set aside: *Edwards v. Burt*, 2 De G. Mac. & G. 55. And see *Edwards v. Brown*, 2 Coll. 100.

A lot purchased by private contract at an inadequate price may be set aside,

although assigned by the same deed with a lot purchased by public auction : *Newton v. Hunt*, 5 Sim. 511.

The rule as to the sales of reversionary interests is not applicable to a sale of property by the reversioner and the person having the prior interest ; for the rule proceeds upon the notion, that he who has only a future interest to sell does not meet a purchaser upon equal terms, but if the person having the prior interest and the reversioner concur in selling property—if, for instance, the father tenant for life, and the son remainderman in tail, concur together in selling estates, they form, in fact, one vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estates ; the onus, therefore, would not lie upon the purchaser, of showing that he gave an adequate price. (See *Wood v. Abrey*, 3 Madd. 422 ; *Wardle v. Carter*, 7 Sim. 490 ; *Cooke v. Burtchaell*, 2 Dru. & War. 165 ; *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735, 736.) But there may, notwithstanding the concurrence of the tenant for life, exist other circumstances in the case which might throw the onus upon the purchaser, to show that he gave an adequate price, as in the case of a purchase by an attorney from his client, or in the case of undue parental influence having been used : see *King v. Savery*, 1 Sm. & Giff. 271 ; S. C. 5 H. L. Cas. 627.

What constitutes inadequacy of price.—There is no rule in our law as to what difference between the real value of the property and the consideration paid constitutes inadequacy of price ; this the Judge must decide. By the *civil law*, a consideration which exceeded half the value of the property was adequate : *Baldwin v. Rochford*, cited 2 Ves. 517 ; *Nott v. Hill*, 2 Ch. Ca. 121, where Lord Nottingham says, “ By the civil law a bargain of double the value shall be avoided,” and wished it were so in England. See C. Lib. iv., Tit. xlv. 1, 2.

As to the valuation of a reversionary interest.—When it becomes necessary to consider the value of a reversionary interest, much difficulty arises from the conflicting evidence usually given—on the one hand, by auctioneers and surveyors, who estimate the value by the *market price* ; on the other, by actuaries, who generally estimate the value according to the *tables*. It is, however, now fully established, that, in calculating the value of a reversionary interest, the Court will be guided not by the tables, but *by the mar- [*490] ket price ; and in the case of real estate, its nature, position, and other particulars ought to be considered as affecting the value of the interest sold. See *Hincksman v. Smith*, 3 Russ. 433 ; *Headen v. Rosher*, M’Cl. & Y. 89 ; *Potts v. Curtis*, 1 You. 543 ; *Newton v. Hunt*, 5 Sim. 511 ; *Wardle v. Carter*, 7 Sim. 490 ; *Ryle v. Swindells*, M’Cl. 519 ; *Edwards v. Browne*, 2 Col. 100 ; *Davies v. Cooper*, 5 My. & Cr. 270 ; *Lord Aldborough v. Trye*, 7 C. & F. 436 ; *Bernal v. Lord Donegal*, 3 Dow, 133 ; 1 Bligh, N. S. 594 ; *Edwards v. Burt*, 2 De G. Mac. & G. 55, 57. The contrary doctrine was supposed to have been laid down by Sir William Grant, M. R., in *Gowland v. De Faria*, 17 Ves. 20 ; but Lord Cottenham, in the important case of *Lord Aldborough v. Trye*, 7 C. & F. 457, denies that such a conclusion is to be drawn from the decision of Sir William Grant. “ There are two propositions, one of which

was established, and the other *supposed* to be established, in that case. The one said to be established was, *that in a transaction with an expectant heir, it was necessary for the party seeking the benefit of that transaction to show that he gave a fair price*; but that proposition has been the subject of much observation, undoubtedly, since that decision took place; and it has been considered as interfering a good deal with that proper discretion which persons who are capable, according to the law of this country, of disposing of their property ought to be at liberty to exercise. At the same time, it does establish a rule which has the effect of protecting persons who are, generally speaking, very much in need of protection. Of the policy of that rule it is not my purpose to say anything; that rule has been established in the case of *Gowland v. De Faria*, and has been recognized ever since.

“But another proposition has been *supposed* to be established by that case, which is, that in transactions of this sort the Court has only to look at the value of the reversionary interest, calculated according to the tables; that is to say, how much of the value of the property is to be deducted on account of its being a postponed interest—postponed by the chance of the duration of another’s life—and, that that is capable of being reduced by calculation to what is considered a fair reduction with reference to the duration of the life on which it is dependent. I do not find any such proposition established by Sir William Grant, in that case. Sir William Alexander, in the case of *Headen v. Rosher*, M’Cl. & Y. 89, and Lord Lyndhurst, in the case of *Potts v. Curtis*, 1 You. 543, entertained the same opinion; and upon looking at the language of Sir William Grant, it does appear to me that that rule is not to [*491] be extracted from it. In that case there was no evidence *but that of the actuaries, and the evidence of the actuaries proved that the sum given was not the marketable value of the reversion. Sir William Grant, in observing on the case, states the evidence before him—namely, that of the actuaries, and says there is no other evidence in the case; and he then proceeds upon that evidence, there being no other. Now the only observation I will make upon that case is, that one may suppose it would have been a more wholesome course to have adopted, seeing that the evidence was only the evidence of the actuaries, and the Court being of opinion that that was not evidence which ought to be conclusive in the case of that description between these parties; I say it would seem to have been better to have adopted some course for the purpose of ascertaining more correctly the value, in the sense in which that term is used in inquiries of that kind. Sir William Grant, however, did not adopt that course, and he decided it upon the only evidence he had, that only evidence being to the effect that an inadequate consideration had been given. It is, therefore, not an expression of opinion by Sir William Grant that that is a rule that ought to be adopted. It is only a dealing with that case with reference to its own particular circumstances. That rule has been disapproved of by the highest authority. It was disapproved of by Sir William Alexander, in a judgment, the reasons of which are very conclusive to show the soundness of the decision at which he arrived: *Headen v. Rosher*, M’Cl. & Y. 89. It was also objected to and disapproved of by Lord Lynd-

hurst, in the case to which I have referred, (*Potts v. Curtis*, 1 You. 543;) and if your Lordships consider what the effect of that rule would be—how inapplicable it is to the great mass of cases, how little calculated it is to lead to a right conclusion, and how much it must interfere with the right of disposing of property—I am sure your Lordships will not hesitate in preferring the rule which has been established in the subsequent cases, to that which has been supposed to have been established in the case of *Gowland v. De Faria*. It is sufficient to say that the establishment of that rule would make it impossible for an expectant heir to dispose of his interest at all. That, I apprehend, is quite a sufficient objection. It is a rule also, which as a general rule, being calculated on the result of a great mass of cases, must apply with great injustice in a great variety of individual cases. The lives are supposed to be of average value, but the life in question may be an extraordinary good or an extraordinary bad one, which is likely to last beyond the usual time, or the contrary. How, then, can it be right to establish a rule not applicable to the particular case, but applying to a mass of *cases collected together, [*492] and to make that rule govern an individual case, to which it may not at all apply?

“My Lords, I will not go further into my reasons for not adhering to that supposed rule. The matter having been very fully and ably discussed by Sir William Alexander and Lord Lyndhurst, it appears unnecessary further to discuss it here than to say that I entirely concur in the reasons of those two very learned judges; and I do not think that the rule supposed to be extracted from *Gowland v. De Faria* is a rule which ought to be laid down.”

The value of a reversionary interest is always to be calculated with reference to the time of the contract, and not to the result; so that, although, in the events which may have happened, a large price has been given for a reversionary interest, the Court cannot take that into consideration, if the price at the time of the contract was inadequate: *Gowland v. De Faria*, 17 Ves. 20, 25.

As to the terms upon which the sale of a reversionary interest will be set aside.—Where any transaction with an expectant heir or reversioner is set aside, on the sole ground of the inadequacy of the price, the Court, proceeding upon the well known maxim, “*that he who seeks equity must do equity*,” will only give relief upon payment of the sum actually advanced, with interest and costs, (*Twistleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. 512; *Wharton v. May*, 5 Ves. 27; *Curling v. Townshend*, 19 Ves. 633; *Bowes v. Heaps*, 3 V. & B. 117; *Evans v. Cheshire*, Belt’s Suppl. to Ves. 312; *Fox v. Wright*, 6 Madd. 111;) except the costs of an unsuccessful reference as to value, (*Boothby v. Boothby*, 15 Beav. 212, 214; *Edwards v. Burt*, 2 De Gex, Mac. & G. 55, 65;) and misconduct on the part of the purchaser of a reversionary interest will disentitle him to costs, (*Baugh v. Price*, 1 Wils. 320; *Gowland v. De Faria*, 17 Ves. 20; *Moroney v. O’Dea*, 1 Ball & B. 109, and the reporter’s note; *Wood v. Abrey*, 3 Madd. 417; *Bautree v. Watson*, 3 My. & K. 339.) But compound

interest will never be allowed to the purchaser: *Gowland v. De Faria*, 17 Ves. 20.

Confirmation and acquiescence.]—Where a person dealing with an heir or reversioner, shows that the transaction is reasonable, and that a fair price has been given, either for a reversionary interest, annuity, or post obit bond, a court of equity will not, in the absence of fraud, set it aside, (*Dews v. Brandt*, Sel. Ch. Ca. 7; *Batty v. Lloyd*, 1 Vern. 141; *Wharton v. May*, 5 Ves. 27; *Curling v. Townshend*, 19 Ves. 634; *Lord Aldborough v. Trye*, 7 C. & F. [493] 436;) *and impeachable transactions, as in *Chesterfield v. Janssen*, may be rendered valid by acts of confirmation, (*Cole v. Gibbons*, 3 P. Wms. 289;) or acquiescence for a great length of time, (*Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735; *Addis v. Campbell*, 4 Beav. 401,) on the part of a person who is cognizant of his right to relief; for it has been well said, “that the presumption which a court of justice most properly entertains against stale demands, can never be more properly applied than in a case where the burden of proof upon a most material point in controversy is thrown upon the defendant,” (3 De G. & Sm. 737;) but confirmation or acquiescence will be of no avail whilst the reversioner continues in the same situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract, (*Gowland v. De Faria*, 17 Ves. 20; *Medlicott v. O’Donel*, 1 Ball & B. 156; *Kendall v. Beckett*, 2 Russ. & My. 88; *Edwards v. Browne*, 2 Coll. 100.) See *Fox v. Mackreth*, ante, 123, and note, 140; and in *Curwyn v. Milner*, 3 P. Wms. 292, n., relief was given even after payment of the money due on a post obit bond, the payment having been made from fear of an execution.

Where a transaction is not merely voidable or impeachable, but is absolutely void, upon principles of public policy, then, as is laid down by Lord Hardwicke in the principal case, it is incapable of confirmation. Thus, a usurious contract was, and marriage-brochage contract still is, void ab initio, and does not admit of confirmation. *Shirley v. Martin*, 3 P. Wms. 74, n.; *Cole v. Gibson*, 1 Ves. 506, 507.

“There is no case where mere inadequacy of price, independent of other circumstances,” said Chancellor Kent, in *Osgood v. Franklin*, 2 Johnson’s Chancery, 1, 23, “has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression.

And the inequality amounting to fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. The doctrine is settled, that in setting aside contracts, on account of inadequate consideration, the ground is fraud arising from gross inequality. Unless the inadequacy does,

of itself, *ex evidentia rerum*, prove fraud, the rule is, says Ch. B. Macdonald, (1 Wightwick, 109,) that inadequacy, by itself, has not the weight suggested. If, indeed, advantage be taken, on either side, of the ignorance or distress of the other, it affords a new and distinct ground, and a very great inadequacy may form a presumption of oppression. Dealing with younger heirs, and for reversionary interests, is also watched with the utmost jealousy, and constitutes a particular class of cases, forming another exception to the general rule, that for mere inadequacy of price a contract is not to be set aside. So, leases of charity estates will be set aside for an undervalue, if considerable, though there be no imputation of fraud, on grounds peculiar to that trust." See also *Juzan et al. v. Toulmin*, 9 Alabama, 663, 686; *Warner v. Daniels et al.*, 1 Woodbury and Minot, 92, 102, 103, 110. The peculiar principle that the sale of a reversion by a young heir, for a very inadequate price, will be set aside in Chancery, without evidence of fraud, is recognized by Catron, J., in *Jenkins et al. v. Pye et al.*, 12 Peters, 241, 257, where the English cases are reviewed. "That such purchase," he remarks, "is a constructive fraud, and the purchaser compelled to account and give up his bargain, if found to be advantageous, has not, for a century, been an open question. The conveyance is treated as a mortgage, and the grantor relieved on payment of the principal advanced and interest; without inquiry whether there was fraud or imposition.

It is a well established principle in courts of equity in this country, that a conveyance or contract will be set

aside, wherever, it has been obtained through undue influence over a person greatly under the power of another, if there is inadequacy of price, or clear ground of inference that a confidence reposed has been abused or advantage has been taken of incompetency, weakness of understanding, or clouded or enfeebled faculties: *Wheeler v. Smith et al.*, 9 Howard's S. Ct. 55, 82; *Whelan v. Whelan*, 3 Cowen, 539, 572; *McCraw v. Davis*, 2 Iredell's Equity, 618; *Hunt v. Moore*, 2 Barr, 105; *Slocum and Wife v. Marshall et al.*, 2 Washington, C. C. 397; *Kennedy's Heirs and Executors v. Kennedy's Heirs*, 2 Alabama, 574, 606. See the principles applicable to this subject, examined in *Taylor v. Taylor et al.*, 8 Howard's S. Ct. 183. "If deeds are obtained," said Marshall, C. J., in *Harding v. Handy*, 11 Wheaton, 104, 125, "by the exercise of undue influence over a man whose mind has ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience, to set them aside. That a court of equity will interpose in such a case, is among its best settled principles." See vol. 2, part 2, note to *Huguenin v. Baseley*. The general principle stated in *Chesterfield v. Janssen*, that equity will give relief against presumptive frauds, and therein will go further than courts of law, where fraud must be proved and not presumed only, has been repeatedly recognized in this country; *Butler et al. v. Haskell*, 4 Dessausure, 652, 684; *Warner v. Daniels et al.*, 1 Woodbury & Minot, 92, 103. "The distinction between legal and equitable jurisdiction upon fraud is this,"

said Woodworth, J., in delivering the opinion of the court in *Jackson v. King*, 4 Cowen, 207, 220; "that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised upon an instrument unduly obtained, when a court of law could not enter into the question, (18 Ves. 483.) In *Butcher v. Butcher*, (1 V. & Beames, 98,) Lord Eldon observes, that some judges have said, that a deed cannot be fraudulent, unless it be fraudulent both in law and equity; but to that doctrine he could not agree, though a strong inclination had been evident to say, whatever is equity ought to be law; an opinion acted upon by Mr. Justice Buller, who had persuaded Lord Mansfield to act upon it, until it was reformed by Lord Kenyon, with the assistance of the same judge; yet the clear doctrine of Lord Hardwicke and all his predecessors was, that there are many instances of fraud that would affect instruments in equity, of which the law could not take notice. The broad ground assumed by Lord Mansfield, (1 Burr. 396,) is, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. This doctrine has, however, been subsequently qualified, according to the distinction taken by Lord Eldon, and is founded in good sense. I am not aware of any express adjudication in our courts. But in 4 Dessaussure, Ch. Rep. 684, it is sanctioned. It was there held, that fraud may be presumed in equity, but must be proved at law. In accordance with these principles, a variety of cases have been decided, and relief afforded in equity, where, from the nature of the transaction, and the situation of the parties, fraud and imposition might be pre-

sumed. (3 P. Wms. 129, Powell on Con. 31.) So, also, in *Chesterfield v. Janssen*, (2 Vesey, 155,) Lord Hardwicke describes one species of fraud, that may be presumed from the circumstances and condition of the parties contracting. And this, he says, goes further than the rule of law, which is, that fraud must be proved, not presumed. Inadequacy of consideration is also a badge of fraud, or a fact connected with other circumstances from which fraud may be inferred, (1 Bro. Ch. Cas. 1.) So, also, a conveyance, obtained from persons uninformed of their rights, will be set aside, though no actual fraud be proved, (2 Id. 150.) In these and many other cases that might be cited, equity considers the instruments as obtained fraudulently from the circumstances and relation of the parties, although no actual fraud is proved. Yet, in none of these cases has it been decided that a court of law would declare the instrument void." "Fraud," said Savage, C. J., in the Court of Errors, on an appeal from Chancery, in *Hall v. Perkins*, 3 Wendell, 626, 631, "is often the subject of inquiry in a court of law as well as in equity; there is this difference, however, that at law fraud must be proved; it must be what Lord Hardwicke calls *dolus malus*, actual fraud arising from facts and circumstances of imposition. At law, the contract of every man who is *compos mentis*, is binding, and cannot be avoided in general without proof of actual fraud in obtaining it. Neither will a court of equity measure the extent of men's understandings, and say that there is an equitable incapacity where there is a legal capacity; yet if a weak man gives a bond for a pretended consideration, when in truth

there was none, or not near so much as is pretended, equity will relieve against it, (3 P. W. 130, 131.) Fraud is sometimes also apparent from the intrinsic nature of the contract. It may be such as no man in his senses and not under delusion would make, and such as no honest, fair man would accept, which is Lord Hardwicke's second class of frauds; and his third is that which may be presumed from the circumstances and condition of the parties contracting, (2 Vesey, Sen. 155, 156.") The case before the court in *Hall v. Perkins*, was pronounced to be that of "a contract which no sensible man not under delusion would make on the one hand, and which no man who had not lost all consciousness of shame would accept on the other. One of the parties was a weak boy, the other a man of capacity, who may be presumed from the circumstances of this case, an artful intriguer in small matters. It was a contract made by an unsuspecting youth with a man in whom, from the connection existing between them, he must have reposed confidence, and to whom he naturally looked for advice and protection. It is clearly a case, therefore, where from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed." See *Conant v. Jackson*, 16 Verm. 335, 349, where the same principles were laid down and applied by the Supreme Court of Vermont.

[It would seem to be well settled in this country, in accordance with the decisions in England, that the sale of an expectancy by an heir, in the lifetime of the ancestor, is contrary to the policy of the law, and void; *Boynton v. Hubbard*, 7 Mass. 112; *The Poor v. Hazleton*, 15 New Hampshire, 564,

unless sanctioned by the ancestor and upheld by an adequate consideration; *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Metcalf, 121; *Nimmo v. Davis*, 7 Texas, 266; when the transfer will not only be valid, but will, if effected by a deed with warranty, bind and pass the title by estoppel, in many of the states of this country, on its subsequent descent to the heir; *Fitch v. Fitch*; *Trull v. Eastman*, 2 Smith's Leading Cases, 637, 5th Am. ed. To contract with an heir for what he may subsequently receive from an ancestor, or from any one from whom he has an expectancy, without the knowledge of the latter, was said, in *Boynton v. Hubbard*, to be a fraud on the ancestor if not on the heir, and to belong to a class of transactions which the courts set aside as contrary to public policy, without examining into their fairness as between the parties. But the severity of this rule would seem to be confined to the sale of expectancies, and not to extend to estates in remainder or reversion, where there can be no fraud on third persons if the sale is fair as between the parties; and in *Cribbins v. Markwood*, 13 Grattan, 495, the Court refused to inquire into the adequacy of the consideration for the grant of a reversion, which had been made by a young man just after attaining his majority, without the knowledge of his mother, who had a life estate in the property, there being no evidence of actual fraud or undue influence. In *Nimmo v. Davis*, 7 Texas, 260, however, the burden of showing the adequacy and fairness of the consideration for such transfers, was said to rest on the purchaser; and a similar opinion was expressed in *The Poor v. Hazleton*, 15 New Hampshire, 564. And there can be little doubt that

chancery may intervene whenever the inadequacy of price, and the other circumstances of the case, are such as to warrant the belief that undue advantage has been taken of distress or weakness, whether the subject-matter of the sale be a reversionary interest or one in possession. *Dunn v. Chambers*, 4 Barbour, 376; *post*, vol. 2, note to *Huguenin v. Baseley*.

It was held, in the recent case of *Needles v. Needles*, 7 Ohio, N. S. 432, 443, that a contract between a father and son, by which the latter agreed to resign all claim on the estate of the former, after his death, in consideration of an advancement made at the time, was equally invalid, at law and in equity, and would not debar the son from recovering in opposition to its terms after the death

of the father. But this case would probably not be followed in the other states of the Union, and is in opposition to the current of decision in England. An advancement may give birth to an equity independently of contract; and certainly, when a contract is superadded to it; and there would seem no reason why an agreement by a son to resign all future claim on the estate of his father, in consideration of an immediate benefit, should not be received with the favor which has been invariably shown by chancery, to agreements between the members of a family, for the disposition or settlement of property in which they have a present or prospective interest. See *post*, vol. 2, notes to *Stapilton v. Stapilton* and *Row v. Dawson*.

MORTGAGES.—TACKING.—FUTURE ADVANCES.

[*494]

*MARSH v. LEE.

TERMINO SANCTÆ TRINITATIS, ANNO 22, CAR. 2.

REPORTED 2 VENTRIS, 337.¹

TACKING INCUMBRANCES.]—*If a third mortgagee having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage or statute, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.*

A BILL in Chancery was brought by Marsh, and an answer put in thereto.

The case was thus:—One English, being seised of the manor of Wicksall and of the Manor of Monfield, in 1649, mortgages part of the manor of Wicksall to Burrell for £1000. Afterwards, in 1655, he acknowledges a statute to Burrell of £800, for the payment of £400.

¹ S. C., 1 Ch. Ca., 162; 3 Ch. Rep. 62.

Afterwards, in 1662, English mortgages both these manors to Mrs. Duppa, for £7000.

Afterwards, in 1665, English mortgages the manor of Wicksall to Lee, for £2000; Lee *having no notice of the former mortgages*.

¹ [After Mrs. Duppa's death, her executors brought actions of ejectment against English, and filed their bill of foreclosure against him. In Michaelmas Term, 1667, English suffered judgment in ejectment against him at the suit of the executors, with a cesset executio until May, 1668. The cesset executio having expired, English obtained an injunction against the proceedings at law, upon the judgment in ejectment, until hearing or another [*495] *order; and on the 5th of June, 1668, a decree was made, that English should redeem within a twelvemonth, or be foreclosed. On the 26th of November, 1668, the Master reported, that 8530*l.* 14*s.* would be payable to the plaintiffs on the 6th of June, 1669.

On the 27th of November, 1668, Lee, by the advice of counsel, purchases in the two incumbrances to Burrell, viz., the mortgage of part of the manor of Wicksall, and the statute.

On the 5th of February, 1669, the Master's report was confirmed. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.]

My Lord Keeper, Sir Orlando Bridgman, assisted by Hale, Chief Baron, and Justice Rainsford, held, that Lee might make use of these incumbrances to protect his own mortgage. For they said, that *he had both law and equity for him*.

First, he had law; for that he had a precedent mortgage in 1649, (which, indeed, was but upon part,) and also the statute in 1655; so that, while these remained in force, Marsh could not come in.

Next, he had equity; for he having a subsequent mortgage, yet it *being without notice*, he ought to be relieved in this Court. And, therefore, my Lord Chief Baron put the case, as if the first mortgage had been of the manor of Wicksall to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, *not having notice*; if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell, and also his own money lent upon the last mortgage: and for that he said, that it had been so adjudged in *Camera Scaccarii*, in the Court of Equity, since the King came in, in one *Shelley's case*.

Next, he put the case of the statute, which English entered in to Burrell, in 1655, and was afterwards bought by Lee from Burrell. He held, that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

**Nota*. It was agreed that the lands were extended upon the statute at the third part of the true value. Now, at common law, the [*496] conusor, or he that claims under him, must bring a "scire facias ad computand," as in the 4 Co. 69, b. But then the conusee shall not account accord-

¹ This statement within brackets is drawn up from 1 Ch. Ca. 162, where the proceedings in the case are fully given.

ing to the true value, but according to the extended value, and also for the whole statute : and if the conusee is satisfied by the extended value, the conusor shall recover ; or if the conusor will pay down the rest of the money which is behind, with damages, he shall also recover. But if the conusor will sue the conusee in a court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then our case here is somewhat more, for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of £2000, as well as the statute ; and therefore, if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole £800 and damages.

Secondly, they held, that whereas part of the manor of Wicksall was mortgaged to Burrell, but that now the whole manor was mortgaged to Lee, that yet the first mortgage should not extend to protect more than that part of the manor which was first mortgaged to Burrell.

And my Lord Chief Baron Hale put the case thus :—If a man is seised of sixty acres, and mortgages twenty to A., and then mortgages the whole to B., and then mortgages the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres ; but it shall protect those twenty acres so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage.

But Hale said, that he thought that in this case, inasmuch as the mortgage to Lee¹ was only of part of Wicksall, that therefore Marsh might bring Lee to [497] an *account upon the extended value, whereupon these two manors were extended upon the statute ; and if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, that then she may discharge the manor of Monfield.

But then my Lord Keeper asked him how he would have it appointed,² and how much should be laid upon Monfield, and how much upon Wicksall ? for that part of Wicksall is under that extent.

To which Hale answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, that Monfield should be discharged by her paying down as much as the proportion comes to, or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the court.

Nota. Sir H. Finch,³ counsel for Lee, cited *Primate and Jackson's case*,⁴ *Grove and Grove's case*,⁵ and *Mrs. Calamy's case*,⁶ all which were resolved in this court—That a purchaser or mortgagee coming in upon a valuable con-

¹ That is to say the mortgage which Lee took as assignee of Burrell.

² Qu. "Apportioned."

³ Afterwards Earl of Nottingham.

⁴ Hardres Rep. nom. Hedworth v. Primate.

⁵ Churchill v. Grove, Nels. Rep. 89 ; 1 Ch. Ca. 35.

⁶ Higgon v. Sydall, Calamy and others, 1 Ch. Ca. 149.

sideration, without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage.

Marsh v. Lee, the pleadings of which are fully stated in 1 Chancery Cases, 162, lays down the doctrine, never since allowed by the judges to be questioned, that a mortgagee, without notice, purchasing the first incumbrance, shall thereby protect his estate against any person having a mortgage subsequent to the first incumbrance, though he purchased in the incumbrance after he had notice of the subsequent mortgage. In *Edmunds v. Povey*, 1 Vern. 187, there were first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee, hearing of the *two [*498] former securities, bought in the first incumbrance, a judgment that was satisfied; it was strongly insisted at the bar, that, though the trade of buying in incumbrances had been formerly countenanced, yet that it was in truth a thing against conscience, and contradictory to many established rules of law and equity. But, after long debate, the Lord Keeper North told them, he wondered the counsel laid their shoulders to a point that had been so long since settled, and received as the constant course in Chancery. "It is true," said his Lordship, "there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so was at first a case very disputable; but being once solemnly settled, as it was in the case of *Marsh v. Lee*, he would not now suffer that point to be stirred." See also *Holt v. Mill*, 2 Vern. 280. In *Wortley v. Birkhead*, (2 Ves. 571,) Lord Hardwicke fully approves of the principal case, and thus explains the foundation of the doctrine it establishes. "As to the equity of this Court," observes his Lordship, "that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general, and was so in *Marsh v. Lee*, by a very solemn determination by Lord Hale, who gave it the term of the 'creditor's tabula in naufragio;' that is, the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and, I believe, was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and, therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity of one side, this Court never thought fit, that, by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had hap-

pened in any other country, it could never have made a question; for, if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est jure*, must hold." And see the remarks of Sir W. Page Wood, V. C., in *Rooper v. Harrison*, 2 K. & J. 108, 109.

[*499] *In the well-known case of *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, the whole doctrine is very accurately stated by Sir Joseph Jekyll, M. R., in a series of rules which it is proposed to consider. The first general rule there laid down, within which, indeed, the principal case falls, is, "that, if a third mortgagee buys in the first mortgage, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favor of a purchaser, every mortgagee being such *pro tanto*."

Where, however, a puisne mortgagee, having obtained the legal estate, parts with it on a sale of the mortgaged estate, he will only be entitled to claim a share of the purchase-money according to his priority in point of date. See *Rooper v. Harrison*, 2 K. & J. 86. "If," said Sir W. P. Wood, V. C., "the Court does not find the legal estate interposed, it deals with the money according to priorities," p. 109.

It will be observed, that it is laid down by Sir Joseph Jekyll, as in the principal case, that it matters not if the third mortgagee advanced his money without notice of the second mortgage, whether he afterwards obtains notice of it by a *lis pendens* or otherwise. "This," says Lord Hardwicke, "has gone so far (and the original case was) that if a puisne incumbrancer took in the first incumbrance pendente lite, still he should have the same benefit: for in *Marsh v. Lee* there was a *lis pendens*, yet was not the party affected with it; and so, I take it, in general it would be, notwithstanding a *lis pendens*: because the principle upon which all these cases depend is this, that a man's having notice of a second incumbrance at the time of taking in the first, does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third, that will affect him; for then, no act he can do will help him. Then a *lis pendens* is nothing but notice; an actual notice is certainly as good as that by a *lis pendens*; one notice is, in consideration of this Court, as strong as another. Nay, actual notice is stronger than that implied by a *lis pendens*; it will not therefore affect him. That was *Marsh v. Lee*, and the other cases, which I agree to:" *Wortley v. Birkhead*, 2 Ves. 574. See also *Huntington v. Greenville*, 1 Vern. 49; *Hawkins v. Taylor*, 2 Vern. 29; *Belchier v. Butler*, and *Renforth v. Ironside*, 1 Eden, 523; S. C., [*500] 5 Bro. P. C. 292, Toml. ed., nom. **Belchier v. Renforth*; *Turner v. Richmond*, 2 Vern. 81; *Willoughby v. Willoughby*, 1 T. R. 773; *Robinson v. Davison*, 1 Bro. C. C. 63.

And, notwithstanding the doubt thrown out by Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 335, ante 240, it is now clearly settled, that notice of his advance, given by the second to the first mortgagee, will not prevent the third

mortgagee, who lends his money without notice of it, from tacking his mortgage to the first: *Peacock v. Burt*, Coote on Mortgages, Appendix.

But a puisne incumbrancer will not be allowed to tack after a decree made to settle the priorities of incumbrancers: *Earl of Bristol v. Hungerford*, 2 Vern. 524, approved of by Lord Hardwicke in *Wortley v. Birkhead*, 2 Ves. 574. So, in *Ex parte Knott*, 11 Ves. 619, Lord Eldon observed, "There is no difficulty upon the point as to a decree to settle priorities. After that you cannot tack certainly, for there is a judgment for the creditors, that they shall be paid according to their priorities. But you may, as was held in the House of Lords, up to the time of the decree, struggle for the tabula in naufragio; and, though the decree is in a sense only a judgment upon the rights as they stood at the time the bill was filed, yet it was decided in that case, that until the decree you might do so."

An exception to the rule is mentioned by Lord Hardwicke, viz. that if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers: Per Lord Hardwicke, in *Morret v. Paske*, 2 Atk. 52. So, also upon the same principle, it was held in *Barnett v. Weston*, 12 Ves. 130, that the executors of a first mortgagee of a leasehold, who had the legal estate in his own right, could not, as against a mesne incumbrancer, tack a mortgage of the equity of redemption which had vested in their testator as the executor of another. See and consider *Wilmot v. Pike*, 5 Hare, 14; *Rooper v. Harrison*, 2 K. & J. 86.

The second rule laid down in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, in accordance with which that case was decided, is, "that, if a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for one cannot call a judgment, &c. creditor a purchaser, nor has such creditor any right to the land; he has neither jus in re nor ad rem; *and, therefore, though he releases all his right to the land, he [*501] may extend it afterwards. All that he has by the judgment is a lien upon the land, but non constat whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by fieri facias, or may take the body, and then, during the defendant's life, he can have no other execution: besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment: nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another." And see *Ex parte Knott*, 11 Ves. 617.

Upon the same principle, in *Lacey v. Ingle*, 2 Ph. 413, A., having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from

incumbrances; part of the purchase-money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money; and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent, and absconded. A. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due; and E., to secure himself, took an assignment of B.'s mortgage. But the balance of purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B., Lord Cottenham, C., reversing the judgment of the Vice-Chancellor Knight Bruce, held, that E. was not entitled to tack his security to B.'s mortgage, first, because he not only did not deal *upon the faith of the land*, or contract for any interest in it, but, as appears upon the face of the contract, relied upon and advanced his money upon the faith of a fund which could only arise and have existence upon the supposition that the party to whom he advanced the money would not have, and at that time had not, any interest in the land; and, secondly, because, although E., at the time he advanced his money, had no notice of any particular incumbrance on the estate, except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject; and, therefore, the equities of D. and E. were not equal.

And it seems doubtful whether ^a judgment creditor, since the [*502] passing of 1 & 2 Vict. c. 110, although a judgment is now a charge upon the land, could tack any more than he could previously. See *Kinderley v. Jervis*, 22 Beav. 1; *Watts v. Porter*, 3 Ell. & B. 743; *Beavan v. Lord Oxford*, 6 De G. Mac. & G. 507.

Another rule in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 494, is, "that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage, and statute or judgment be paid." See, also *Shepherd v. Titley*, 2 Atk. 348; *Anon.*, 2 Ves. 662. A fortiori, if the first mortgagee lends on a mortgage: *Morret v. Paske*, 2 Atk. 52.

However, in all these cases, as is laid down in the sixth rule in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 495, no subsequent incumbrancer will be allowed to tack his incumbrance, unless when he lent his money he had *no notice* of the second mortgage, statute, or judgment; for being without notice is his sole equity.

And it has even been held, contrary to the old case of *Gordon v. Graham*, (7 Vin. Ab. 82. pl. 7; 2 Eq. Cas. Ab. 598,) that although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee made a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance. See *Shaw v. Neale*, 20 Beav. 157; there an estate was mortgaged to A. to secure a sum of money and *further advances*. Afterwards Shaw, the plaintiff, obtained a charge on the estate by means of a judge's order. It was held by Sir John Romilly, M. R.,

that the further advances made to the mortgagor by A., after notice of the order, had no priority over Shaw's charge. "The law," said his Honor, "with respect to the question whether a second incumbrancer who takes, subject to a prior mortgage expressed to secure a sum then due, and also future advances, is entitled to priority over the advances made subsequently to his security by the first incumbrancer, with notice of such second incumbrance, is a point not free from doubt on the authorities. The ground on which it is put, in favor of the first mortgagee who claims priority for his subsequent advances, is, that the second mortgagee might, by a tender of the amount due to the first mortgagee, have stopped all further advances; and the case of *Gordon v. Graham*, (7 Vin. Ab. 52, pl. 3; 2 Eq. Ca. Ab. 598,) is cited, where Lord Cowper held, that the second incumbrancer having, when he advanced his money, notice of the nature of the first mortgage, could not redeem the first mortgage without payment of the sum advanced by the first mortgagee after he had received notice of the second incumbrance. *This decision has not met with the unanimous approbation of the profession. Mr. Powell, in his [*503] Treatise on Mortgages, (2 Pow. Mortg. 6th ed. 534, n; but see 4 Byth, 2nd ed. 427,) doubts the soundness of the decision; and Lord St. Leonards, in *Blunden v. Desart*, (2 Dru. & W. 405,) says, 'that even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration whether it would be safe to rely in all cases upon *Gordon v. Graham*, as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage.' This case of *Gordon v. Graham*, has never, I believe, been treated as an authority for holding that the doctrine applied to the case of a second incumbrancer, who advanced his money *without notice* of the first mortgage. Lord Cowper certainly relies on the fact of notice; for he observes, that it was the folly of the second mortgagee, with notice (of the first incumbrance) to take such security. This reasoning obviously fails to apply to the case of a second incumbrancer, who not only had no notice of the prior incumbrancer, but who obtains his charge on the estate not by reason of any contract with the owner, but by operation of law, which gives to the registered order to pay the effect of an incumbrance on the land, for a debt which the debtor had refused or was unable to pay." And see *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Hare, 272; *Cannock v. Jauncey*, 5 W. R. 764.

The last rule laid down in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 495, is "that when a puisne incumbrancer buys in a prior mortgage, in order to unite the same to the puisne incumbrance, but it is proved that there was a mortgage prior to that, the Court clearly holds, that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: *qui prior est in tempore potior est in jure*." See *Symmes v. Symonds*, 4 Bro. P. C. 328, Toml. ed.; *Earl of Bristol v. Hungerford*, 2 Vern. 524; 1 Eq. Ca. Ab. 142.

But if any one of the incumbrancers has a better title than the others to call

for a conveyance of the legal estate, as for instance, when a declaration of trust of the legal interest has been made in his favor, or he has possession of a deed creating a term, equity will consider him as being in the same state as if he had the legal estate: *Windham v. Richardson*, 2 Ch. Ca. 213; *Wilkes v. Bodington*, 2 Vern. 599; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 486; [**504*] *Ex parte Knott*, 11 Ves. 618; **Maundrell v. Maundrell*, 10 Ves. 271; *Wilmot v. Pike*, 5 Hare, 22.

Where a first mortgagee or any of the mortgagees purchases and takes a conveyance to himself of the equity of redemption, he cannot set up his mortgage against any of the subsequent incumbrances of which he had notice; *Toulmin v. Steere*, 3 Mer. 210; *Brown v. Stead*, 5 Sim. 535; but a prior mortgage, if kept on foot against the estate, may be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances. See *Parry v. Wright*, 1 Sim. & St. 369; S. C. 5 Russ. 142; and see *Otter v. Lord Vaux*, 2 Kay & J. 650.

As to the nature of Statutes and Recognizances, see *Burton's Compendium*, pl. 868.

The principle established in *Marsh v. Lee*, that a third mortgagee, without notice, may buy in the first mortgage, and thereby exclude a second mortgagee, does not appear to be received in any court in this country. The system of registration is universal here, and it is considered to be the policy of that system, that a mortgage shall not be a security for more than the debt expressed in the mortgage, *as against other incumbrances*. In New York, Connecticut, Ohio, and Virginia, the doctrine has been expressly condemned and excluded.

In *Grant and others v. Bissett and others*, 1 Caines' Cases, 112, the chancellor had decided in favor of the practice of tacking, but his decision was reversed in the Court of Errors, where it was decided that the statute which directs that mortgages which are first registered, shall have preference according to the times of the registry, had abolished, with respect

to registered mortgages, the right of tacking a junior to a senior mortgage, and thus excluding an intervening one; since the allowing of a junior mortgage to be paid first, would be denying to the older one the preference given to it by statute. "Under our laws, and the decisions of our own courts," said the chancellor in *Bridgen v. Carhartt*, Hopkins, 234, 235, "a registered mortgage is regarded as an incumbrance for the debt expressed in the mortgage, and for no greater sum. Such is the sense of the act concerning mortgages; and though the great objects of the registry are to secure mortgagees, to give notice to purchasers, and to regulate priorities, it seems also to be the spirit of all our statutes respecting mortgages, that a registered mortgage shall never become a security between any parties, for any other debt than that specified in the registered instrument. The English doctrine, by which a mort-

gage subsequent to a second mortgage may be tacked to the first, in exclusion of an intermediate mortgage, has been adjudged by the Court of Errors, to be inconsistent with our law concerning registered mortgages, 1 Caines' Cases in Error, 112. The English doctrine of tacking has thus been rejected, in the only adjudged case in which any attempt to enforce it appears to have been made in our courts."

"We have not adopted, in this State," said Huntington, J., in *Osborn v. Carr*, 12 Connecticut, 196, 208, "the doctrine of tacking mortgages, so as to give priority to a third mortgagee over an intervening one. This is a consequence of the admitted rule, that the registry of a deed, is, here, constructive notice, and equivalent to actual notice, of the specific mortgage, which is recorded. . . . The doctrine of tacking, as understood in England, and which is merely giving priority to a third mortgagee, as to his mortgage, over an intermediate incumbrance, by buying in the legal title, cannot exist here, because the record of the second mortgage is equivalent to actual notice of its existence. Such has always been the law of this State.

. . . There are other reasons than those which we have suggested, which, independent of decided cases in our courts, would constrain us to reject the English doctrine of tacking. It is unjust and inequitable, and is supported there, only by the weight of authority. . . . The case of *Marsh v. Lee*, was perhaps the first in which the English doctrine of tacking was fully established. It was a precedent subsequently followed with evident reluctance, and which the courts in Westminster Hall did not

feel at liberty to overrule. It may be added, that this doctrine is generally exploded in the United States, by which we are relieved from a multitude of refined distinctions, which have given intricacy to this peculiar branch of equity jurisprudence. (4 Kent's Com. 178, 179.)"

In Ohio, it is declared, that it has ever been held in that State, that the principle of tacking, as applied to mortgages, or to mortgages and judgments, cannot be allowed; *Brazee and others v. The Lancaster Bank and others*, 14 Ohio, 318, 321.

In a late case in Virginia, this doctrine was examined at considerable length, and considered to be unreasonable in itself, and opposed to the policy of the registration acts. "This whole doctrine of tacking," said Baldwin, J., "unless in the case of further advances originally provided for by contract, is extremely harsh and unreasonable. Natural justice obviously requires that valid incumbrances should be paid according to their priority in point of time. The first incumbrance is an appropriation of the property by the consent of the owner, or the operation of law, to the satisfaction of a just demand; and so a second incumbrance is an appropriation, in like manner, of what shall remain after satisfaction of the first. The first incumbrancer who, after a second incumbrance, enlarges his demand beyond the effect of his original contract, is in truth, as regards the second, only a third incumbrancer; and a third incumbrancer is nothing more as regards his original demand, though he purchases in the first incumbrance.

"The doctrine is justified by no one, upon the principles of natural justice, and rests for its support upon artifi-

cial reasoning. It was introduced and is sustained upon the ground, that the mortgagee entitled to its benefit has the advantage of the legal title, and has equal equity, and therefore the law shall prevail. But the assumed equality of equity is not well founded. There is no color for it except in the idea that each claimant is a *bona fide* purchaser for a valuable consideration; but that does not produce equality in point of right. He whose incumbrance is thus overreached is prior in point of time, and at least equal in equity; and, therefore, should have the benefit of the maxim, *Qui prior est in tempore potior est in jure*.

“The elements of the doctrine, it will be seen, are the possession by the preferred mortgagee of the legal title, and the pre-existence or accession of a distinct equity, without notice of the *mesne* incumbrance. Hence, it is obvious, that it could never have been introduced into a country enjoying the benefits of a general registry, intended to give notice to the whole world of all conveyances and incumbrances, and to supply the place of actual notice.

. . . In nearly all the States of this Union, the registry is held to be notice to subsequent purchasers and mortgagees, provided the deed has been duly proved or acknowledged. . . . It is easy to perceive that the operation of the registry laws of Virginia, and of other States of the Union, is to cut up by the roots the English doctrine of tacking, so far as it affects intermediate purchasers and incumbrancers.” *Siter, Price & Co. v. McClanachan et als.*, 2 Grattan, 280, 300, 301, 303, 304.

In Kentucky, some earlier cases had apparently recognized the equity

of tacking; *Bank of Kentucky v. Vance's Administrators*, 4 Littell, 168, 173; *Nelson's Heirs v. Boyce*, &c., 7 J. J. Marshall, 401, 405; but in a late case the existence of this principle seems to be considered doubtful. “When a prior mortgage,” said the court, “does not provide for subsequent liabilities or advances, the British doctrine of tacking all such liabilities as shall have been incurred, or all such advances as shall have been made, on the faith of the property thus mortgaged, and without actual notice of a subsequent mortgage thereon, has not been conclusively established in this court. And whether it shall be recognized here, as either authoritatively settled, or as consistent with principle or analogy, we shall not now pause to determine or to consider.” *Averill v. Guthrie*, 8 Dana, 82, 84.

[The doctrine, that a purchase in good faith, and without notice, gives the purchaser an equity, which a subsequent notice cannot take away, and which he may protect against antecedent equities, by procuring a conveyance of the legal title, has been assailed as unjust, but would seem a necessary consequence of the preference, which, between equal rights, should always be awarded to superiority of diligence. Thus, a chattel sold successively to different persons, will belong to him to whom it is first delivered, or who first clothes his title with possession, irrespectively of the date of his purchase; *Shaw v. Levy*, 17 S. & R. 99; *Winslow v. Leonard*, 12 Harris, 15; 1 Smith's Lead. Cas. 891, 5th Am. ed.; and of two assignees, of the same *chose in action*, he will have the preference, in England, and in many of the States of the Union,

who first gives notice of the assignment to the trustee or debtor, who owes or holds the obligation which forms the subject of the assignment; *post*, vol. 2, notes to *Basset v. Nosworthy*, and *Ryall v. Rowles*. That the holder of an equity, who neglects or fails to procure a conveyance of the legal title, should be postponed to a claimant whose estate is subsequent in date to his own, but who has guarded his interest with the forms of law, is therefore equally consistent with analogy and reason; and the cases which apparently tend the other way, would seem all to have turned on the rule, which makes the registration of a deed notice, and not to be necessarily in point, when the question arises between unregistered equities, or when the registry acts are from any cause inapplicable. This view is sustained by the cases of *Baggaly v. Guthrie*, 2 Jones, Equity, 80, and *Carroll v. Johnston*, *Ib.* 120; which decide in accordance with the decisions in England, that when equities are equal in point of merit, each having been acquired in good faith, and without notice, and the junior equity gets the legal title, chancery will not intervene to take away the advantage thus acquired, although its acquisition may have been with full notice of, and for the express purpose of obtaining priority over the elder equity; *Powell on Mortgages*. "It is," said Pearson, J., in *Baggaly v. Guthrie*, "a familiar learning, that one who has, without notice, acquired an equity, may afterwards protect it, by acquiring the legal title. The latter purchaser or incumbrancer, becomes, on payment of his money, an honest claimant in equity, and is entitled, if he can, to protect his claim. He is

not bound to look for protection, until he has ascertained that danger exists; *Adams*, 232, (162.)"

There would, consequently, seem to be nothing to prevent the holder of a third mortgage, from obtaining priority over a second, of which he was ignorant at the time of taking his own, and which has not been placed on record, by buying in the first, or obtaining a conveyance of the legal title in any other manner, although the question is one of little practical importance, because it cannot arise unless both mortgages are unrecorded, when it will always be easier to record the third, than to resort to the expedient of buying in the first.

It is necessary to remember, that to render the legal title a protection against a prior equity, the holder must be a purchaser in good faith, in the sense in which equity defines a *bona fide* purchaser, and must, consequently, have bought on the faith of a real or pretended legal title, as well as for value, and without notice. And it would, consequently, seem doubtful, whether one who buys a mere equity, with full knowledge of its real nature, can acquire an advantage over prior equities, by the subsequent acquisition of the legal title, although the point was held differently in *Baggaly v. Guthrie*, and *Carroll v. Johnston*; and the pledge of an equity growing out of a contract of sale, held to give all the rights incident to a purchase for value.]

There is another branch of the doctrine of tacking, quite distinct from that considered in the preceding case; under which, when a mortgagee has made further advances to the mortgagor, and taken his bond, binding himself and his heirs, the mortgagee

may tack such bond debt to his mortgage, as against the heir or devisee, who upon a bill filed to redeem is not allowed to do so without paying the bond as well as the mortgage debt; but this is admitted to be only a matter of practice, to prevent circuity of action, and it is never allowed to the prejudice of another incumbrancer, or creditor, whose claim is of equal degree with the bond debt; see *Chase v. McDonald and Ridgely*, 7 Harris & Johnson, 161, 196, 197; *Coombs v. Jordan*, 3 Bland, 284, 330; *Lee and Wife*, and *Jordan v. Stone and M^cWilliam*, 5 Gill & Johnson, 2, 22; *Downing, &c. v. Palmateer*, 1 Monroe, 64, 70; *Hughes and Balinger v. Worley*, 1 Bibb, 200, 201; *Colquhoun v. Atkinsons*, 6 Munford, 550, 556; *Siter, Price & Co. v. M^cClanachan et als.* 2 Grattan, 280, 299. In South Carolina, this rule has been laid down in much larger terms; it is said there, that on a bill filed by the mortgagor to redeem, he must pay not only the mortgage debt, but all other debts he may owe the mortgagee, whether by bond or simple contract; the reason being, that as the legal title is in the mortgagee, by breach of the condition, the mortgagor will not be permitted to redeem until he has satisfied all the mortgagee's equitable demands; but on a bill filed by a mortgagee to foreclose the equity of redemption, only the money due on the mortgage can be demanded; *Walling v. Aiken*, 1 M^cMullan's Equity, 2, 10, 13; and the rule was laid down in the same way, in *Lee v. Stone*, 5 Gill & Johnson, 1.

In Pennsylvania, this species of tacking has been decided to have no existence; a mortgage in that State being a security for only the specific

debt, and not capable of being used to secure any other debt; *Dorow v. Kelly*, 1 Dallas, 142; *Anderson and another v. Neff*, 11 Sergeant & Rawle, 208, 223. [And the recent case of *Thomas's Appeal*, 6 Casey, 378, carried this course of decision to its farthest limits, by deciding that a mortgage given by two co-partners, of four lots of land, held by them as tenants in common, for a debt of the firm, was extinguished by the conveyance of two of the lots, in satisfaction of the debt, in pursuance of an agreement made with one of the partners, notwithstanding a stipulation that the mortgage should stand as security for a debt due by him, in his individual capacity, which was said to be void, as an attempt to create a mortgage, merely by parol, and incapable of binding either his share of the land, or that of his co-partner.

It is, however, well settled in Pennsylvania, that a collateral agreement, that a mortgage shall stand as security for future advances, is valid, not only as between the original parties, but as against third persons, whose liens attach before the money is advanced; at all events, where there is a binding agreement to make the advances, as well as that they shall be secured by the mortgage when made; *Lyle v. Ducombe*, 5 Binney, 585; *Parmentier v. Gillespie*, 9 Barr, 86; *Ter Hoven v. Kerns*, 2 Id. 96; *Moroney's Appeal*, 12 Harris, 372. In most of these cases, the agreement was in writing, and thus escaped the objection which might otherwise have arisen under the provisions of the Statute of Frauds; but this cannot be said of *Parmentier v. Gillespie*, where, however, the court confined their decision to the bond, and declin-

ed to express, any opinion, as to the validity of the mortgage. There is, however, little doubt, that a mortgage may be shown to have been given as security for the payment of a note, or the performance of an obligation, other than, and differing from, the obligation set forth in the bond, by oral testimony, and without the aid of a writing; *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293; *The United States v. Sturges*, 1 Paine, 525; and if such an agreement is valid, when contemporaneous with the execution of the mortgage, it must be equally so at any subsequent period.

It should, moreover, be remembered, that to make payment an extinguishment, independently of intention, it must be at the day, and amount to performance; and that payment after the day will not satisfy a debt due by specialty, or even on simple contract, unless there is an express or implied agreement to receive it in satisfaction; *ante*, 141. Where, therefore, one debt is substituted for another, with the express purpose of continuing the lien of a bond and mortgage given as collateral security for the latter, and preserving it intact for the protection of the former, there is, obviously, no legal payment of the bond, and equity should not go beyond the law, except for the furtherance of the intention of the parties, and the purposes of justice; *Hind v. Evans*, 1 Freeman's Chancery, 79; *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293. This view is sustained by the cases in the other States of the Union, which establish that a mortgage will be a valid security for further advances, when such is the express or

implied understanding with which the advances are made, and whether the understanding is set forth in, or evidenced by writing, or consists in a mere oral agreement, and is proved solely by the testimony of witnesses; *Shiras v. Craig*, 7 Cranch, 34, 51; *Kendrick v. Robinson*, 2 Johnson's Chancery, 283, 309; *Brinkerhoff v. Marvin*, 5 Id. 320, 326; *James v. Johnson*, 6 Id. 417, 429; *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293. The fair deduction from these authorities, as a whole, would seem to be, that an agreement that a mortgage shall stand as security for the general balance of accounts between the parties, will be equally binding, whether it is made at the execution of the mortgage, or at any subsequent period, and will not lose its efficacy, because one debt or security is put in the place of another, so long as it is apparent, that the object in view is a renewal or substitution, and not a payment; *Heard v. Evans*, 1 Freeman's Chancery, 79; *The Bank v. Finch*. And such should, it would seem, unquestionably be the result, when the defendant rests his case on the ground that the mortgage is a security for the payment or performance of a debt or obligation, not set forth on its face, or on that of the bond, because the defence is then a mere equity, contradicting both the bond and mortgage, and nothing is better settled than that an equity raised by parol may be rebutted in the same manner.

The better opinion would, however, seem to be, that to bring a subsequent advance within the protection of an antecedent mortgage, it must be made without notice of the equities of intervening incumbrancers; *Brinkerhoff*

v. *Marvin*, 5 Johnson's Chancery, 320, 327; *Shirras v. Craig*, 7 Cranch, 34, 51; or in pursuance of a binding agreement to make it, which ties the hands of the mortgagee, and renders it his duty to proceed without regard to the notice; *Moroney's Appeal*: and the case of *Ter Hoven v. Kerns*, decides, that when a future advance is discretionary, and not the result of contract or obligation, the record must be searched before it is made, for the purpose of learning whether any rights or equities have been called into being, in the interval, which, being prior in point of time, should also have a superiority of right; and that advances made without taking this precaution, will be postponed to those whose rights would otherwise be prejudiced by the omission. But as this decision virtually precludes the use of land, as a security for a floating balance, and thus trammels the operations of business, we may doubt whether it will ultimately be followed; and it would seem more just and reasonable to require the second mortgagee to pay, or satisfy the first, or else give him actual notice of the subsequent incumbrance.

In *Townsend v. The Empire Stone Dressing Company*, 6 Duer, 208, an oral agreement that a mortgage which had been given to secure the faithful performance of one contract for the delivery of stone, should stand as security for another contract of the same nature, was held to be inoperative even as between the original parties, and not to make the fulfilment of the second contract, a condition precedent to the exercise of the right of redemption, growing out of the performance of the first.

"It is urged by the plaintiff, and

to a great extent with truth," said Hoffman, J., in delivering the opinion of the court, "that the doctrine of tacking is unknown to our law. When that doctrine is carried to the length of enabling a mortgagee to unite a third incumbrance to his own, to the prejudice of an intermediate mortgagee, of whose claim he is ignorant, our law condemns the rule. Other examples of the principle carried to an extremity clearly denounced in our tribunals, may be found in Mr. Powell's elaborate Treatise (on Mortgages, vol. 2, p. 423, etc.)

"But the question is different when the case is exclusively between a mortgagor and mortgagee, and especially when the mortgagor comes to ask for an assignment of his security. In this simple form, the right of the creditor to require payment of a further subsequent claim was recognized by the Civil Law, (Code, 8, 27, 1; *Vide Digest Lib. 13, 7-8.*)

"In *James v. Rogers*, (15 Mass. Rep. 3, § 9,) Justice Jackson, in an able opinion states, as the result of his examination of the Roman law, that a pledge might be retained, not only for the amount loaned upon it, but for all other moneys due to the pledgee on any account whatever. He cites Huber, Prælections, Heinecius, and the Code. Justice Wilde admits this to be the rule as to debts contracted after possession of the pledge, and so does Chief Justice Parker.

"Judge Story admits that the civil law authorizes a mortgagee to unite, as against his own debtor, a second loan without security to the first, when the debtor seeks to redeem; (Story's Eq. § 415, n. 2; *Ib.* 1010.) See also Domat, vol. 1, p. 348, art. 4, and the note.

"A somewhat similar doctrine is found in the French Code. A novation of the debt, as a general rule, extinguishes the hypothecation. But when it operates solely between the creditor and debtor, to whom the mortgaged property belongs, they can by contract, transfer the things mortgaged for the ancient debt to the new one. This works no prejudice to the other creditors, because it does not prevent them from seising the property, and selling it precisely as they might have done before the translation. The new obligation cannot exceed the old in amount, and it must be made at the time of the novation, not subsequently. (Touillier Droit Civil Française, tome 7, arts. 308, 310, and note to 312.)

"In the earlier cases, in England, it was explicitly laid down, that a mortgagee coming to redeem, must pay any moneys subsequently advanced, as well as the original mortgage money. In *Demany v. Metcalf*, (Gilbert's R. 104,) this rule was stated in the analogous case of a pledge of jewels; and the Lord Chancellor stated his opinion to be that the rule would be applied to a mortgage of lands. In *Baxter v. Manning*, (1 Vernon, 244,) the point was decided in a case of a bond given for moneys subsequently advanced, and without any special agreement; *Halliday v. Kirtland*, (2 Chan. Rep. 361,) and the anonymous case, (3 Salkeld, 84, fol. 7,) are to the same effect.

"The case of *Coleman v. Winch*, (1 P. Wills. 775,) is generally cited by the text writers as reversing these decisions. But it is far from having that effect. An ancestor borrowed £100, and mortgaged lands to secure it; he afterwards borrowed £100 more

upon bond; he died, and his heir conveyed the equity of redemption to trustees, to pay all his father's bond and simple contract debts. The trustees brought a bill to redeem, and the defendant insisted upon the right of having both debts paid. This was denied. But Lord Macclesfield expressly admitted, that if the heir had come to redeem, he must have paid both demands. The difference was, that the rights of creditors intervened in consequence of the conveyance in trust by the heir.

"The same principle is found in *Lothian v. Hasset*, (3 Bro. Ch. Rep. 192.) There shall be no tacking as against other specialty creditors, where the suit is for administration of legal assets.

"I have examined a large number of subsequent authorities down to *Jones v. Smith*, (2 Vesey, Jr. 372, 1794,) in which case they are reviewed. Lord Alvanley states, as the result, that a bond may not be tacked to a previous mortgage, as against a mortgagor, nor against creditors, but may be against the heir, to avoid circuity of action. That if there are two mortgages to the same person of different estates, and one is deficient in value, the property can only redeem by paying both; and why a bond should not be upon the same footing, he did not know. It was impossible to say why a bond should not be tacked as well as a mortgage. The doctrine that two mortgages may be thus united upon a bill to redeem, is also recognized in the case of *Watts v. Symes*, (8 Eng. L. & Eq. Rep. 207.)

"There were several cases before Lord Eldon bearing upon the point. In *Ex parte Langston*, (17 Vesey, 228,) in bankruptcy, he held, that an

equitable mortgage by deposit of deeds should stand for future advances, upon proof of a distinct agreement, though by parol, to that effect. In *Ex parte Waner*, (17 Vesey, 202;) *Ex parte Whitbread*, (Ib. 209,) and *Ex parte Kensington*, (2 V. & Bea. 79,) the same rule was declared. In the latter case, he expressed his strong disapprobation of the doctrine.

“Then in *Ex parte Hooper*, (19 Vesey, 477; 1 Merivale, 7,) he expressly ruled, that where there was a legal mortgage, it could not be rendered a security for subsequent advances, upon parol evidence of an agreement to that effect. It would be a violation of the Statute of Frauds, requiring a writing to change lands.

“In *Diver v. McLaughlin*, (2 Wendell, 599,) the law is stated in the same manner; as also in *Walker v. Snediker*, (1 Hoffman’s Rep. 147,) and Chancellor Kent treats it as the settled English rule, (Com. vol. 4, p. 176.)

“In *Rolfe v. Chester*, (25 L. J. R. p. 246, 1854,) the right of a mortgagee to have a simple contract debt tacked as against the heir, was admitted, simple contract debts now binding real estate. In *James v. Rice*, (27 L. and Eq. Rep. 342; 5 De Gex, and M’Naughton, 461,) deeds had been placed in the hands of the plaintiff, as security for a promissory note, and upon a further advance, the party promised to execute to the lender a mortgage for the whole amount. This was held binding. See, also, *Uppington v. ———*, (2 Drury and Warren, 184.)

“Some cases in our own state bear upon the question; *Grant v. The United States Bank*, (1 Caines’ Cases in Error, 112,) and *James v. Morey*,

(6 John. Ch. Rep. 420, and 2 Cowen, 247.) Justice Willard treats, *James v. Morey*, as establishing this proposition, ‘that if a deed, absolute in its terms, be intended as a mortgage, and it be shown by parol to be also intended as a security for further advances, it will, as between the parties, be treated as a mortgage for the subsequent advances as well as the original debt.’ (Eq. Jur. 436.)

“That this proposition is warranted by the opinion of Chancellor Kent, when the cause was before him, cannot be disputed.

“But in the Court of Errors, Justice Woodworth, after examining various cases, says, ‘They show conclusively that the respondent cannot divert the securities taken, from the object specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, (the debtor) and particularly when an objection is interposed by a *bona fide* creditor, holding a judgment made valid by an amended specification.’

“This question was considered as of so little moment in the decision of the cause, that neither of the other judges or senators notice it in their opinions, or only to pass it over. As to decisions in some other States, see *Scripture v. Johnson*, (3 Conn. Rep. 211,) and *Chamberlain v. Thompson*, (10 Conn. 251,) allowing the union of demands upon a bill to redeem. So in Maryland, (*Lee v. Stone*, 5 Gill & Johnson, 22.)

“Another class of cases may usefully be adverted to. In *Walker v. Snedaker*, (Hoffman, Rep. 146,) I observed, that it appeared to be the better opinion, if not the settled law, that a mortgage which was to cover

future advances, ought to express the object on its face. In *Craig v. Tappin*, (2 Sand. Ch. Rep. 82,) Assistant Vice-Chancellor, Sanford, came to a different conclusion after examining the authorities, and held, that it was enough that the mortgage show upon its face the utmost amount which it was intended to secure; and up to that amount it would be valid, for future advances, when such was part of the original agreement.

"In *The Bank of Utica v. Finch*, (3 Barbour's Ch. Rep. 204,) Chancellor Walworth declares the rule to be, that future advances may be covered by a mortgage to the extent of the sums mentioned in it. He says, 'that parol evidence is admissible, not to contradict the written instrument, but to show the purpose and extent for which it was executed. It was admissible to show that credit had been given to Finch upon the several discounts for him on the faith of the mortgage, and that it was treated by the complainants as a continuing security. Here is a mortgage, the record of which is a notice to all of an incumbrance to the extent of \$30,000, and I suppose the holder of that mortgage may advance upon it up to that amount, and may be secure in his lien to the extent of his advance within that amount, such having been the agreement between himself and the mortgagor.'

"In such a state of the authorities, we are at full liberty to determine the question untrammelled by peremptory decisions. We cannot but conclude that parol evidence of an agreement, by which a mortgage given to secure a definite sum, shall operate to secure a further sum subsequently advanced, contradicts the rule, that such evi-

dence shall not be allowed to add to the terms of a written instrument, and would, in effect, charge lands without an instrument in writing, signed by a party competent to charge them; (2 R. S. 134, § 6.)

"The English authorities are of various classes. One is of bills to redeem, where the forfeiture being perfect at law, the court has refused its interference but upon payment of other demands justly due. This was held in the early cases, but it is very doubtful if it is now the law.

"Another class is of mere equitable mortgages, where the whole principle is the intendment resulting from the advance and deposit deeds. This peculiar equity is, perhaps, unknown in our State, probably from the operation of the registry acts.

"A third class is, where the question is between the heir or devisee and mortgagor; then, when there are legal assets, a bond creditor heretofore and lately a simple contract creditor, may unite his demands. The reason is, that the land has become subject to a lien in his favor.

"The union of one mortgage debt to another mortgage debt, as against the mortgagor, rests upon the same principle of a charge on the land.

"As to the decisions in our own state respecting the extension of a mortgage, so as to cover future advances, I understand it to be the law, that they never can exceed the sum stated in the mortgage, and I understand it not to be the law of any case, that if such sum was unpaid, the mortgage could, by parol, be extended to an additional sum.

"Thus understood, there is a lien created for a definite sum, the advance of which may be made in different

amounts at different times. This is a very different case from that of the original debt unpaid, and a parol agreement to charge the mortgaged land with another sum.

“The result in our judgment is, that the defendants are not entitled to hold the mortgage as security for the amount of the subsequent extra supplies and labor.”]

PRIMARY LIABILITY OF PERSONALTY.

[*505] *DUKE OF ANCASTER *v.* MAYER.

JUNE 26, 1783. JUNE 16, 1784–85. JULY, 1785.

REPORTED 1 BRO. C. C. 454.

PRIMARY LIABILITY OF PERSONAL ESTATE TO THE PAYMENT OF DEBTS.

—EXONERATION.—*Personal estate, not specifically bequeathed, is primarily liable to the payment of the debts of a testator, unless it be exempted by express words or necessary implication.*

Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator subject to a mortgage shall bear the burthen of that mortgage, it not being properly the debt of the testator.

CHARLES BERTIE made his will, dated the 9th of November, 1759, and thereby devised as follows: “I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, &c., in Lincolnshire, to have and to hold to them, from the time of my decease, for the term of ninety-nine years, upon the trusts hereinafter mentioned.” He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie, for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: “I do hereby declare, that the term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer, their executors, administrators, and assigns, for ninety-nine years, is upon the special trust and confidence, and to the intents and purposes following; that is to say, Upon trust and confidence that they the said Thomas Noel and John Mayer, their [*506] *executors, &c., shall out of the rents and profits, or by mortgage, assignment, or demise of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that, after so

much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine." He then devised as follows: "I give and devise to my brother, Montague Bertie, his executors and administrators, all that the manor of East and West Deeping, holden by lease from the Crown, subject to the yearly rents and covenants reserved in the said lease, and also subject to the mortgage thereon to Mrs. Millicent Neate, of London, for 6500*l.*; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations in this my will."

And towards the end of his will he devised as follows: "Item, I also give all my household goods, and all other my goods chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother, Montague Bertie, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will: provided always, and I do hereby declare my mind and will to be, that in case I shall at the time of my death leave issue of my own body, that then and in such case as well all and every the before-mentioned uses, devises and limitations to my said brother, Montague Bertie, the *Duke of Ancaster, [*507] and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will, and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons, as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of this my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, and *all my debts and legacies*, as soon as they shall become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to deduct and satisfy to him or themselves, out of my personal estate, or out of the moneys to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or means whatsoever in or about the execution of this my will."

Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will, to the real estate.

The leasehold estate had been, several years before, mortgaged by the testator's father for 6500*l.* to Mrs. Neate, and in 1765 the mortgage was assigned, by the desire of the testator, to Sir Thomas Palmer, who advanced the testator a further sum of 100*l.* on it, and the testator conveyed other estates as an additional security for the 6600*l.*

This cause was first heard before the late Lords Commissioners.

[*508] Mr. *Mansfield*, Mr. *Madocks*, and Mr. *Kenyon*, for the *plaintiffs.—There are three questions in this case : first, whether the personal estate is exonerated of the debts ; secondly, whether the mortgaged estate is liable to the mortgage ; thirdly, what interest the duke takes in the personal estate. As to the first, although the personal estate be the original fund for the repayment of debts, yet the testator may discharge it against the devisee of his real estate ; and if his intent so to discharge it appear upon the face of the will, that intention shall govern. Here he has created a term for the payment of his debts, which sufficiently points out his intention. The cases show, that an intention so demonstrated is sufficient. *Bamfield v. Wyndham*, Pre. in Ch. 101 : the testator providing a real fund for the payment of his debts, and giving his personalty to his wife, it was held, she should take it exonerated from the debts. *Wainwright v. Bendlowes*, 2 Vern. 718 : devise for payment of debts, and the personalty held exempt. In *Walker v. Jackson*, 2 Atk. 624, the personal estate was held to be a specific legacy, and of course exonerated. *Anderton v. Cook*, 4th June, 1775 : Thomas Calendar gave several specific parts of his personal estate ; he then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees, in trust to sell for the payment of debts ; and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The Court held, she took it wholly exempt from the debts. In *Stapleton v. Colville*, Ca. t. Talb. 202 ; in *Holliday v. Bowman*, before Lord Bathurst, 1 Bro. C. C. 145, cited ; *Kynaston v. Kynaston*,¹ and *Glede v. Glede*, the same doctrine has been held. Secondly, the second point is, whether the mortgage shall also be discharged by the real estate. This point is determined by the case of *Serle v. St. Eloy*, 2 P. Wms. 386, which is recognized in *Galton v. Hancock*, 2 Atk. 437. Thirdly, the last question is, what interest the duke shall take. He claims under the description of the person [*509] who should come into possession, and must *take the same interest that Montague Bertie would have taken ; that is, the absolute interest.

Mr. *Schwyn*, Mr. *Arden*, and Mr. *Ainge*, for the defendants.—As to the last question, we contend the duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burthen. As to the other, which is the principal question, it depends on the several clauses in the will. The first clause creates the term ; the next, which

¹ The testator by his will charged his whole estates with payment of all his debts, legacies, and funeral expenses ; and for that purpose he devised particular lands to trustees, in trust to sell the same and pay his debts, legacies, and funeral expenses ; and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate. Lord Bathurst determined the personal estate to be exempt.

is material, is that by which he gives the personal estate; the third, that appointing the executors, and directing them to pay the debts by such means as they should think meet. In this case there is no specific bequest of the personal estate. If he had meant the executors should pay the debts out of the term, he would not have left it in their option how they should pay them. In order to exonerate personal estates from the payment of debts, there must be an express direction that they shall be paid out of some other fund, or something tantamount to such express direction; but here is no necessary implication that the fund should be exempt. In *Bamfield v. Wyndham* the debts were more than the amount of the personal estate. In *Wainwright v. Bendlowes* the estate was ordered to be sold out and out. In *Bromhall v. Wilbraham*, (at the Rolls, November, 1734,) the testator gave all his personal estate to his sister, whom he made executrix; he gave his real estate to his brother, charged with his debts; but the personal estate was held to be first liable. In the case of *Lord Inchiquin v. O'Brien*,¹ (8th February, 1744,) before Lord Hardwicke, the Earl of Thomond by his will directed that all his debts should be paid. He devised his real estate to Lord Inchiquin and another, in trust that they should make sale of a sufficient part of the estate, and out of the money arising therefrom, together with the rents and profits, should, in the first place, pay all the debts which he should owe at the time of his death, and his legacies; and subject thereto he limited his real estate over. He gave Sir William Wyndham £20,000, and some other legacies; then followed these words: "and his further will was, that [*510] the whole money to be raised by such sale should be taken as part of his personal estate;" lastly, he gave the rest and residue of his personal estate whatsoever, after payment of his debts, to the defendant: the personal estate was first applied. In *Fereges v. Robinson*, Bunb. 301, the same doctrine was laid down, because, as the Court observed, there were no negative words to exonerate the personal estate. In *Stephenson v. Heathcote*,² Harper devised lands to trustees, in trust, by sale or mortgage, to raise so much money as would pay all his debts and funeral expenses; he then gave a silver tobacco-box to A. B., and gave all the residue of his personal estate to his wife, and made her executrix: Lord Northington ordered the personal estate to be first applied.

Lord Commissioner ASHHURST delivered the opinion of himself and Lord Commissioner HOTHAM.—The first question is, whether, under the will of Charles Bertie, the plaintiff is entitled to the personal estate, discharged of the debts. Secondly, whether the personal estate is the fund out of which the mortgages are to be paid. Thirdly, what estate the plaintiff takes in the freehold and personal estate.

The main question is, whether the plaintiff is entitled to the personal estate discharged of the debts. The cases are determined on different grounds. *Adams v. Meyrick*, 1 Eq. Ca. Ab. 271, which is in favor of the plaintiff, made the ground that the testator said that the trustees do and shall, by mort-

¹ Lord Inchiquin v. French, Amb. 33; 1 Cox, 1; 1 Wils. 82.

² 1 Eden, 38.

gage, &c., pay: this is a very loose ground, and has been since abandoned. *Fereges v. Robinson*, in Bunb. 301, is the most sensible case. In *Walker v. Jackson*, 2 Atk. 624, Lord Hardwicke says, the general rule is, that the personal estate shall be first applied, but that against his devisee the testator may charge his real estate instead of his personal. The personal estate must be first applied, unless there are express *words or a plain intent to the [*511] contrary. The only question in every case of this kind is, whether you can satisfactorily find out whether the testator meant to exempt the personal estate from the debts, for there are no technical words by which it is to be done. In this case, if it depended on the two clauses in the will, the intent could not be doubted—the trustees are to raise sufficient to pay all the debts. The next thing to be considered is, whether there is anything in the latter part of the will to overturn this apparent intent. It seems highly probable the word “residue” was thrown in without any meaning, or to give an option to the trustees out of which fund to take their expenses, and that they might not be in advance. At all events, it excludes the idea that the charge was to fall upon the personalty. The more modern authorities have gone in exclusion of the personalty, upon much less reason: *Anderton v. Cooke*; *Holiday v. Bowman*, 1 Bro. C. C. 145, cited. We think the Duke of Ancaster is entitled to the personal estate, exempt from payment of debts.

The next question is, whether it should be charged with the mortgages. And as to this point, we are bound by the cases of *Serle v. St. Eloy*, 2 P. Wms. 386, and *Galton v. Hancock*, 2 Atk. 424, to decree that the mortgage must be paid out of the devised estate.

The third question is, what interest the duke takes in the personalty. He took an absolute one: there is no need of express words for this purpose; it is beyond a doubt Montague Bertie would have taken absolutely; then, where the testator gives it by the description of the person entitled to the freehold, he does not state the interest so given to be a less interest than that of Montague Bertie.

A petition was presented for a rehearing, which came on before Lord Thurlow, the 16th of June, 1784. The arguments used, and the cases cited, were a recapitulation of those before the Lords Commissioners.

[*512] LORD CHANCELLOR THURLOW.—It would be highly advantageous *to property if there was a settled rule where the personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken towards such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have

always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. I therefore take the rule in primis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal estate, is sufficient of itself to exempt it. But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but, with great deference to the opinion which has been given, I think there is not sufficient in this will.

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money to pay his debts and legacies; and after raising them, the *term is to cease. He then disposes the rest of his personal estate. He afterwards determines what [*513] shall be done with the personal estate in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue; by which he means the devise of the personal estate after the specific bequest. He provides, then, that, if he should die leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is, whether any inference is to be drawn that he meant it should go with the burthen the law throws upon it, or it is to be presumed that it should be exonerated, for the purpose of throwing that burthen on the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further; for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator in this respect, if

[*514] there were not another point, which I *think ought to undergo further inquiry—I mean the mortgage of the leasehold estate. The case of *Serle v. St. Eloy*,¹ went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of £6000, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

The Master having made his report that the £6000 was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer,² the cause was again set down for argument on the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

LORD CHANCELLOR THURLOW.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of the testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

The point ought to be fixed; and, in order to make it so, I take it, the rules have been these, and should be adhered to. In the first place, that *the personal estate is *liable in the first instance to the payment of the debts*;

[*515] but, (in exception to this,) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts; and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Fereges v. Robinson*,³—that the testator must use express words for that purpose; but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that *where there is a declaration plain, that shall stand in lieu of express words*. This rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice

¹ 2 P. Wms. 386.

² A further sum of £100, was, it seems, advanced to the testator. Vide ante, p. 507.

³ Bunb. 301.

take a course contrary to former rules. Therefore, if there be a declaration plain, or manifestation clear, so that it is apparent, upon the face of the will, that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts.

In regard, then, to the general intention of the will of Charles Bertie, the testator was seised of a real estate, which he had in his contemplation, (exclusive of the idea of his own children,) and wished to leave it to other lines of the family of Bertie; and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, &c. : so far, in respect of the real estate, his intention was to fix it in the name and blood of the family.

The next object he had in view was a leasehold estate, which he held under the Crown; that estate was a chattel interest, and with regard to that, he does not show such *a wish to fix and continue that estate in the line [*516] of Bertie: his apparent wish was not so strong as in respect to the disposal of his real estate; for had it been so, though he could not have created an entail of this leasehold estate with limitations over, yet he might have prevented the first taker of it from alienating it. Had the testator been asked the question, whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though, perhaps, he might have answered, that that estate should pay the debts: but whatever his intention was, he has positively given it subject to the payment of the debt: therefore, if another estate had been appropriated to payment of his debts, and this had been *his* debt upon the estate, I should have concurred with the Lords Commissioners: ¹ but in following them in that course, in which they considered it as being the clear intention in the mind of the testator, that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it should not, and that he chose that the leasehold estate should be so appropriated, rather than to have burthened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty; but, in case of failure of issue, he gives it to the next heir who should come into possession, &c. Had the real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate, for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law; and it must have been appropriated to the payment of debts, let him have charged it any manner he pleased.

When the testator purchased this leasehold estate, he purchased the equity of redemption; and the mortgage *was to be considered merely as a [*517] real incumbrance on the estate itself, and not a personal debt, as

¹ Sed vide *Bootle v. Blundell*, 1 Mer. 227; *Bickham v. Cruttwell*, 1 My. & Cr. 763.

against the purchaser, according to the rules of this Court and cases decided. For if a man purchases an equity of redemption, subject to incumbrances that shall be real incumbrance following the land, and not a personal one, the question is, whether, by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare, and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn v. Evelyn*, 2 P. Wms. 659, never been decided, a fair argument might have arisen upon that head; because, where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be sued upon that covenant; and such a debt has priority before other simple contract debts. Now, I do not know in what court, or by what rule, the debt would have followed the purchaser personally; but *Evelyn v. Evelyn* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose: and it is to be understood, with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument.

The next question is, whether, when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference; as if, in *Evelyn v. Evelyn*,¹ an additional real fund had been secured for making the debt good, that would have turned the judgment: it would not; for nothing makes it his debt so effectually as the covenant to pay; for it does not create the debt, but only operates as collateral to the debt. A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security; and if there is a bond or a covenant, *then there is a [518] collateral security of a higher species, but no higher by means of the mortgage merely: therefore, having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was not one of the testator's debts, and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners, could that intention have been made clear; but the intention does not amount to a declaration plain, in any sense in which these words have been properly applied.

For the purpose of securing property and the due administration of justice in a free country, judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal. It is a fixed rule, that the personal estate must be first liable, unless another fund is provided; the testator must express his intention to discharge that estate from the payment of debts.

¹ 2 P. Wms. 659.

With regard to the intention apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years. Whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words; but the intent of these words, as they stand, naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference; but constructions thus picked up, and collected from more circumstances than are [*519] necessary for the purpose, are not good ways of *finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favorable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay, not only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, &c. How are these to be paid? Out of the personal estate, or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate—an optional clause, and empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable, and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatsoever. As to *Adams v. Meyrick*,¹ that depended on the circumstance of the personal estate being a provision for the wife; and, therefore, the Court forced a construction upon the will, and it is, as Lord Hardwicke termed it, in *Walker v. Jackson*, 2 Atk. 624, a weak case: in the latter case, the republication of the will was an argument much relied upon. As to the cases determined upon the words “rest and residue,” I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determinations as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton v. Colville*,² in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her to charge either fund, there never was a stronger case against charging the real estate; for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his *name [*520] and family, and yet charges it with the payment of the debts. Lord Talbot observed, much might arise from the examination as to the quantum of the debts and the amount of the personal estate. Lord Talbot took it as clear, that such an examination should be gone into. In *Stephenson v. Heathcote*,³

¹ 1 Eq. C. Ab. 271.² Ca. t. Talb. 202.³ 1 Eden, 38.

it is said expressly, no examination can be had. In that case, Lord Keeper Henley relied much upon the wife being executrix. The case was this: that the testator gave all his real estate to R. and his wife for ever, with a charge thereon for payment of debts; and, after disposing of other property, he gives a silver tobacco-box to his uncle, and all the residue he gives to his wife for ever, whom he appointed sole executrix. The Lord Keeper's observation upon this case was, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it; and, upon general principles and rules established in the cases, that the Court could not go into the testator's circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only made his real estate an auxiliary fund: according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule, and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to show his intention to give the residue free from debts, but that the primary fund should be liable.

In the present case, I am obliged to differ from the Lords Commissioners, and consider the whole personal estate as liable to the payment of the debts; and, with respect to the leasehold estate, that the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment, *ex relatione*.

[*521] *The rule laid down by Lord Thurlow, in the principal case, viz., *that the general personal estate of a testator is the primary fund for the payment of his debts, unless it be exempted by express words or manifest intent*, has been fully recognized, although the difficulty of gathering the intent, where the exoneration of the personal estate does not depend upon express words, has induced subsequent judges to join in the doubt intimated by the Lord Chancellor, of the wisdom of the departure from the older decisions, requiring express words to exempt the personal estate from its primary liability. In the case of *Watson v. Brickwood*, 9 Ves. 453, Sir W. Grant observes, "There is no reason whatsoever, either of justice or convenience, to induce me to depart from the rule laid down by Lord Thurlow in *The Duke of Ancaster v. Mayer*, requiring that, in order to exonerate the personal estate, there shall be either express words or a plain indication of that intention. Indeed, I wish the rule had been still more strict, and that nothing but express words had been permitted to alter the course and order of law. . . . However, after the cases that have been decided, it is too late to say, it is not open to the Court to collect from the whole will an intention to exonerate the personal estate, though that intention is not expressed by any positive and exclusive words."

The rule, therefore, as to the primary liability of the personal estate, does

not apply when it is exempted, first, by express words of a testator, (and on this head it will be unnecessary to make any observation :) or, secondly, by his manifest intention in lieu of express words.

In considering this subject it should be always borne in mind that the burthen of proof lies on those who contend that the personal estate is exonerated: *Whieldon v. Spode*, 15 Beav. 539; *Lord v. Wightwick*, 1 Drew. 576.

It has been frequently decided, that neither a charge upon land, nor a direction to sell, nor the creation of a term for payment of debts; (see *Tower v. Lord Rous*, 18 Ves. 132, 138; *White v. White*, 2 Vern. 43; *Bridgeman v. Dove*, 3 Atk. 201; *Lord Inchiquin v. French*, 1 Cox, 1; *Hancox v. Abbey*, 11 Ves. 186; *Rhodes v. Rudge*, 1 Sim. 79; *Collis v. Robins*, 1 De G. & Sm. 131; *Walker v. Hardwick*, 1 My. & K. 396; *Ouseley v. Anstruther*, 10 Beav. 453; *Quennell v. Turner*, 13 Beav. 240;) nor a devise of real estate, upon the condition of the devisee paying the testator's debts, (*Bridgeman v. Dove*, 3 Atk. 201; *Mead v. Hide*, 2 Vern. 120,) will exempt the personalty from its primary liability. "It is not sufficient," says Lord Thurlow, "to charge the real estate, but a testator must show that it was his purpose that the personal should *not be applied:" *Samwell v. Wake*, 1 Bro. C. C. [*522] 145. So Lord Eldon, in *Boote v. Blundell*, 1 Mer. 220, observes: "I take it to be certain, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged."

And parol evidence will not be admitted to show the intention of a testator to give his personal estate free from debts; nor will any inference be drawn of the testator's intention, by a consideration of the relative amount of his personal estate and debts; nor, consequently, will any inquiry be directed in order to ascertain such relative amount: *Stephenson v. Heathcote*, 1 Eden, 38, overruling the cases of *Gainsborough v. Gainsborough*, 2 Vern. 252, and *Lady Glanville v. The Duchess of Beaufort*, 2 Vern. 648. See, also, *Boote v. Blundell*, 1 Mer. 221, and *Tait v. Lord Northwick*, 4 Ves. 816. In the last case, a testator devised certain estates to trustees, upon trust, by sale or mortgage, or by sale of the timber thereon, to raise such sums of money as should be requisite to pay his debts by mortgage, bond, or by other specialty, or by simple contract, or otherwise howsoever; and, after payment of the said debts, he directed the trustees to convey the estates, or such parts thereof as should not have been disposed of, and the equity of redemption of such parts thereof as should have been mortgaged, to certain uses; and, after giving each of his trustees a legacy of £100, he gave all the rest, residue, and remainder of his personal estate whatsoever, to his two sisters equally, and he appointed two of the trustees executors. It was argued, from the state of the testator's property, his personal estate being small and inadequate for payment of his debts, that he must have intended that his real estate should be primarily liable, for otherwise his sisters would take nothing. But Lord Loughborough, C., held the personal estate primarily liable. "Charging the real estate," observed his Lordship, "ever so anxiously for payment of debts, will not of itself

be sufficient to exempt the personal estate. I set the whole doctrine afloat, if the argument for the two sisters upon this will is allowed to prevail; for it only comes to this—there are two circumstances; one, that there is a gift of residue of the personal estate; another, that there is a very anxious charge of debts upon the real estate. Beyond that I have no ground to stand upon: all the rest of the circumstances are merely conjectural upon a supposed intention; and, it is asked, what could the testator mean by giving these sisters his personal estate, if they get nothing by it? All I say to that *is, that a man giving the residue of his personal estate, does not in general mean much. It is as it may happen.”

A mere charge of funeral or testamentary expenses, or of both, in addition to debts upon real estate, will not of itself exempt the personalty: *Brydges v. Phillips*, 6 Ves. 570; *Stephenson v. Heathcote*, 1 Eden, 38; *Aldridge v. Wallscourt*, 1 Ball. & B. 312; *Tait v. Lord Northwick*, 4 Ves. 816; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurle*, 5 Ves. 540. Sed vide *Burton v. Knowlton*, 3 Ves. 107, in which case, Lord Alvanley, M. R., considered that the direction to pay debts and funeral expenses out of a fund to arise from the sale of real estates devised to trustees who were not executors, upon whom the funeral expenses would naturally fall, afforded a considerable argument that the testator did not mean the personal estate to be the fund for all those charges which naturally fall upon it, and that the residue which was given to a person for his own benefit, who was afterwards appointed executor, was specifically given, and consequently only liable as an auxiliary fund to the realty. See however, the comments upon this case by Lord Loughborough, C., in *Tait v. Lord Northwick*, 4 Ves. 823, and by Lord Eldon, C., in *Bootle v. Blundell*, 1 Mer. 229.

But where a testator throws upon his real estate all those burthens which naturally fall upon the personal estate as a primary fund, such as funeral and testamentary expenses, debts, and legacies, a strong, though not absolutely conclusive, argument arises, that the testator intended to give his personalty as a specific legacy, free from those charges, and that, consequently, the realty is the primary fund for their payment: *Tower v. Lord Rous*, 18 Ves. 139. In *Bootle v. Blundell*, 1 Mer. 238, with regard to funeral and testamentary expenses being charged on real estate, Lord Eldon, C., says, “On looking through the precedents, it is impossible to deny that this is a circumstance on which great stress has always been laid, namely, where the real estate is made liable to the payment of such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will.” See also *Plenty v. West*, 16 Beav. 173.

As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses “of the execution of the trusts of the will.” See *Lord Brougham v. Lord William Poulett*, 19 Beav. 119; and see *Morrel v. Fisher*, 4 De G. & Sm. 422.

It has been determined, that an express charge of some particular debts, as simple contract debts, or legacies on the personalty, for the payment of which,

without such charge, it would be primarily liable, *will not, according to the maxim "expressio unius est exclusio alterius," raise a [*524] presumption sufficiently clear that it is only to be the auxiliary fund for payment of other charges not expressly charged upon it, but which are charged upon the land. See *Brydges v. Phillips*, 6 Ves. 567, and *Watson v. Brickwood*, 9 Ves. 447, in which case a testator devised his real estate to a trustee upon trust for his nephews, W. W. and R. B., for life, with remainders over. He then gave legacies to several nieces, in blank, payable at the end of a year after his death, by his executor, and bequeathed all and singular his goods, chattels, personal estate, and effects, whatsoever and wheresoever, not thereinbefore disposed of unto his said nephew W. W., his executors, administrators, and assigns, he paying thereout all and singular legacies, and *all his funeral expenses and simple contract debts*. The testator, then noticing that he was indebted, by *mortgages and bonds*, for money borrowed to pay for some of the estates he had purchased, directed that those debts should be paid by the devisees in equal proportions; and, after giving an annuity to a servant out of the real estate, *he appointed his nephew W. W. his executor*. The will, it must be observed, does not charge the real estate with any debts; but the testator, by a codicil, appointed a trustee in the place of the one named in the will, and empowered the new trustee, "in order to raise money for the payment of *all and singular his debts and legacies*, to *mortgage*, with the approbation of the taker for the time being of his estates, a competent part of his said freehold estates, for so much money as should be necessary for that purpose; and he directed his trustees for the time being to keep down the interest;" and by another codicil he appointed another trustee, and gave other legacies. It was contended, that the personal estate was exonerated from the debts and legacies, or, at any rate, was liable only to the simple contract debts. Sir W. Grant, M. R., admitting that there was some indication of an intention to exonerate the personal estate, observes: "But it is not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in *The Duke of Ancaster v. Mayer*; that is, a *plain intention*. By directing that the executor, to whom he gives all his personal estate, shall pay thereout all the legacies, funeral expenses, and simple contract debts, *prima facie* there is some appearance of an intention that he does not mean the personal estate to be liable to debts by specialty. But that alone, upon the authorities, is not sufficient." In *Boote v. Blundell*, 1 Mer. 230, Lord Eldon says, with respect to this case, that it was rightly decided, taking the will and codicil together. "But if," said his Lordship, "the codicil had not *existed, there are circumstances which appear to me to be such as might have given [*525] occasion to some observations which do not occur either in the judgment or in the argument: still, I repeat that I think that case was rightly decided." See, also, *Davies v. Ashford*, 15 Sim. 42.

A bequest of *all* the personal estate (with or without an enumeration of particulars,) as distinguished from a mere general residuary bequest, will not, at any rate, *where the legatee is also appointed executor*, exonerate the personalty passing under such bequest, although lands are devised in trust to pay

all the testator's debts. See *Harewood v. Child*, stated Ca. t. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324; *Brummel v. Prothero*, 3 Ves. 111; and *Aldridge v. Lord Wallscourt*, 1 Ball. & B. 312, in which case all the personal estate was given to the executor, one of the trustees of the real estate, in trust for the legatee. The cases, therefore, of *Kynaston v. Kynaston*, *Holliday v. Bowman*, *Bamfield v. Wyndham*, cited in the principal case, may be considered as overruled.

The inference against the exoneration of the personal estate, when the legatee is also the executor, arises upon the assumption that he takes the personal estate in that character, with all the burthens attached to it, in a regular course of administration.

And it has recently been held that the personalty will not in similar cases be exonerated where the legatee is *not* executor: *Collis v. Robins*, 1 De G. & Sm. 131: *Ouseley v. Anstruther*, 10 Beav. 453.

But, in some cases, the distinction between the mere residuary bequest, and a gift of *all* the personal estate, has been considered important. Thus, in *Tower v. Lord Rous*, 18 Ves. 138, Sir W. Grant, M. R., observed, "that there was nothing except the common residuary clause—'all the rest and residue of my personal, of what nature or kind soever;' not 'all my personal estate,' not 'all which I have not hereinbefore disposed of,' or any other of those forms which in several cases have been held to denote an intention to give the personal estate as a specific bequest." And in *Bootle v. Blundell*, 1 Mer. 228, Lord Eldon, C., with reference to the clause in the principal case, by which the testator gives to his brother "his household goods, and all other his goods, chattels, effects, and personal estate, whatsoever and wheresoever," if he should be living at the testator's decease, observes, that on those words a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed by the words, "and personal estate whatsoever," *not "and all the residue of my personal [*526] estate:" but that such argument was put out of the question, in that case, by a subsequent clause, in which he expressly refers to this as "the devise of the residue of his personal estate."

And, accordingly, in many recent cases, where the personalty has been bequeathed, not as a residue, but as a whole, and the debts and funeral and testamentary expenses have been charged upon the real estate, the real estate has been held the primary fund for their payment. See *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Driver v. Ferrand*, 1 Russ. & My. 681; *Blount v. Hipkins*, 7 Sim. 43; *Jones v. Bruce*, 11 Sim. 221; *Coote v. Coote*, 9 Ir. Eq. Rep. 197; 3 J. & L. 175. [*Lightfoot v. Lightfoot*, 27 Alabama, 351; *Harley v. Harley*, 1 Bailey, Eq. 397; *Brown v. Jones*, 3 Strobbart's Eq. 24.]

The principle, however, of these cases will not be applicable where a testator subjects his personal as well as his real estate to the payment of his debts, funeral and testamentary expenses: *Paterson v. Scott*, 1 De G. Mac. & G. 531.

But a testator may by implication take away the primary liability of the

personal estate, if he clearly shows his intention to place it elsewhere; thus in *Webb v. Jones*, (2 Bro. C. C. 60; 1 Cox, 245,) the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to be added to his personal estate, Sir Lloyd Kenyon, M. R., held the personal estate to be exonerated, upon the ground, it is presumed, that the testator clearly showed that he did not contemplate the possibility of the whole personalty being applied before the realty, which it might have been if it was to be applied in its natural order. See also *Shallcross v. Wright*, 12 Beav. 505; *Fisher v. Fisher*, 2 Kee. 610.

Again, where a testator devised an estate at Charleywood, and bequeathed certain specific chattels, upon trust to sell, and in the first place to pay all his just debts, funeral and testamentary expenses and legacies, and after giving some pecuniary legacies, the testator declared that the moneys to arise by such sale as aforesaid, should be "*the fund primarily applicable to the discharge of his said debts, funeral and testamentary expenses and legacies.*" And in case it should be insufficient, the testator by a codicil charged his Highbury estate "with the payment of so much money as should be requisite to make good the deficiency," it was held by Sir J. Leach, M. R., that the personal estate was only liable after the two estates had been exhausted. "It is not necessary," said his Honor, "that there should be words expressly exempting the personal estate, if the instruments afford a clear intention on the part of the testator that it should be exempted. The Charleywood estate, and the articles to be sold therewith, are *expressed to be the primary fund, and the plain intention of the testator is, that the Highbury estate should be the [*527] secondary fund." *Dawes v. Scott*, 5 Russ. 32. See also *March v. Fowke*, Rep. t. Finch, 414; *Bateman v. Earl of Roden*, 1 J. & L. 356; *Evans v. Evans*, 17 Sim. 106; and *Bootle v. Blundell*, 1 Mer. 193; 19 Ves. 494.

It seems where a testator has exempted personalty which he has bequeathed from its primary liability to debts, that the exemption will not be extended for the benefit of next of kin who take the personalty in consequence of a lapse. In *Waring v. Ward*, 5 Ves. 675, Lord Loughborough, C., puts this case. "If an estate be given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts to which he would be liable if no such provision had been made; and is not a general exemption of the personal estate. . . Nothing can be more clear than that where an exemption is created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises." See also *Hale v. Cox*, 3 Bro. C. C. 322; *Hancox v. Abbey*, 11 Ves. 179; *Noel v. Lord Henley*, 7 Price, 241; Dan. 211; but see and consider *Milnes v. Slater*, 8 Ves. 295-305; *Fisher v. Fisher*, 2 Kee. 610.

No inference of an intention to exonerate the personalty arises from the appointment of an executor, who, there being no bequest of the personalty, was entitled to it by such nomination, although the debts and funeral expenses are thrown upon the land, (*Gray v. Minnethorpe*, 3 Ves. 103, 104;) nor where he is a trustee of it for the next of kin, (*M^c Cleland v. Shaw*, 2 S. & L. 538, 543;)

upon the principle, that there is no specific disposition of the residuary personal estate. But the executor may take the personal estate, either beneficially or as trustee for the next of kin, exonerated from the payment of debts and legacies, if another fund is provided for their payment, and the personalty has, by express words, been exempted: *Milnes v. Slater*, 8 Ves. 305.

Where there is a general charge of *legacies* upon land, or a devise in trust to pay *legacies* generally, the personal estate will be the primary fund for their payment; as if A. devised real estate upon trust to sell and pay legacies, and afterwards gave B. a legacy of 1000*l.*, A.'s personal estate will be the primary, his real estate the auxiliary fund only for its payment: *Kirke v. Kirke*, 4 Russ. 449.

But a testator may show that it is his intention to make legacies payable out of another fund. *Greaves v. Powell*, 2 Vern. 248; *Boughton v. Boughton*, 1 H. L. Cas. 406; *Whieldon v. Spode*, *15 Beav. 537. In *Woodhead* [*528] *v. Turner*, 4 De G. & Sm. 429, it was held upon the language of the will, that an annuity was primarily payable out of specifically devised real estates.

Where there is a trust to pay particular sums out of real estate, as if A. devise real estate to B. upon trust to pay 1000*l.* to C., such sum is considered as part of the real estate, and the personal estate will not, even upon a deficiency of the real estate, be liable to the payment of it, (*Spurway v. Glynn*, 9 Ves. 483; *Hancox v. Abbey*, 11 Ves. 179; *Gittins v. Steele*, 1 Swanst. 24; *Lamphier v. Despard*, 2 D. & W. 59; 1 C. & L. *200; *Dickin v. Edwards*, 4 Hare, 273; *Bateman v. Lord Roden*, 7 Ir. Eq. Rep. 240; 1 J. & L. 368; *Jones v. Bruce*, 11 Sim. 221; *Ashby v. Ashby*, 1 Coll. 549; *Roberts v. Roberts*, 13 Sim. 336; *Evans v. Evans*, 17 Sim. 102;) and should the testator sell the estate out of which the sum is to be paid, the legacy will be adeemed: *Newbold v. Roadnight*, 1 Russ. & My. 677.

In those cases in which the real estate has been disposed of by the testator, or is inadequate to pay a legacy, it becomes important to consider whether the legacy is specific, because then it would be payable only out of the real estate; or demonstrative, because then it would, upon the failure of the real property, be payable out of the general assets. As to this, see *Savile v. Blacket*, 1 P. Wms. 778; *Attorney-General v. Parkin*, Amb. 566; *Cartwright v. Cartwright*, cited 2 Bro. C. C. 114; *Roberts v. Pocock*, 4 Ves. 150; *McClelland v. Shaw*, 2 S. & L. 538; *Smith v. Fitzgerald*, 3 V. & B. 2; *Mann v. Copland*, 2 Madd. 232; *Fowler v. Willoughby*, 2 S. & S. 354; *Wilcox v. Rhodes*, 2 Russ. 452; *Colville v. Middleton*, 3 Beav. 570; *Dickin v. Edwards*, 4 Hare, 273; and see note to *Ashburner v. Macquire*, vol. 2, post.

But it appears that a devise of real estate, upon trust to raise a certain sum for payment of debts, (*Clutterbuck v. Clutterbuck*, 1 My. & K. 15,) or to pay a particular debt to which the personal estate is also liable, will render the real estate the primary fund for the payment of such sums. *Hancox v. Abbey*, 11 Ves. 179; *Welby v. Rockliffe*, 1 Russ. & My. 571; *Evans v. Cockeram*, 1 Coll. 428; *Bateman v. Earl of Roden*, 1 J. & L. 356; *Coote v. Coote*, 3 J. & L. 178. Sed vide *Noel v. Lord Henley*, 7 Price, 241; S. C., Dan. 211, there

Richards, C. B., observed, "that he could not make any distinction between a direction that real estate should be chargeable with a particular debt of 20,000*l.*, and a devise of real estate subject to all the testator's debts; for the 20,000*l.* was only part of those debts." See, however, the remarks on this case in Lord St. Leonard's work on the Law of Property, p. 363.

*Where a specific personal fund is subjected to charges, (which otherwise would fall upon the general personal estate,) as debts, legacies, funeral and testamentary expenses, such specific fund will not be the auxiliary, but the primary source for their payment. (See *Browne v. Groombridge*, 4 Madd. 495; *Choat v. Yeates*, 1 J. & W. 102; and see *Phillips v. Eastwood*, 1 L. & G. t. Sugd. 294; *Evans v. Evans*, 17 Sim. 106,) except when the residue is undisposed of, in which case it will be primarily liable. Thus, in *Hewett v. Snare*, (1 De G. & Sm. 333,) where a testator had bequeathed specific chattels to his widow, charged with payment of a pecuniary legacy and of all his just debts and funeral and testamentary expenses, and bequeathed other specific and pecuniary legacies, *but made no residuary bequest*, it was argued that, if it could be construed as a charge, only in the event of the general residue being insufficient, the words would be inoperative; and *Choat v. Yeates*, (1 J. & W. 102,) and *Browne v. Groombridge*, (4 Madd. 495,) were cited. Sir J. L. Knight Bruce, V. C., said, that "in both those cases there was a residuary bequest. In the case then before the Court, the words of the will would not be inoperative if they were construed as charging the property bequeathed to his widow in preference to other specific legacies, but not in preference to undisposed of residue." And his Honor was of opinion that there was not a sufficient indication of an intention to exonerate the residuary estate. See also *Holford v. Wood*, 4 Ves. 76.

Although the payment of debts is thrown by a testator upon a particular fund, and he devises or bequeaths other property discharged from such debts, if the particular fund should prove insufficient for payment of debts, the other property will be applicable for that purpose in the usual order. See *Lord Brooke v. Earl of Warwick*, 1 H. & T. 142; there a testator devised an estate, (which he had mortgaged,) and bequeathed specific personal property, and his residuary personal estate to different persons, *freed and discharged* from his debts, &c., and he devised real estate to trustees, upon trust to sell and pay his debts. The estate devised for payment of debts was insufficient for that purpose. It was held by Lord Cottenham, C., affirming the decision of Sir J. L. Knight Bruce, V. C., (reported 2 De G. & Sm. 425,) that the residue was primarily liable, and that the devisees of the mortgaged estates were entitled to exoneration thereout. "The only way," said his Lordship, "in which this case was attempted to be argued was this: that the gift of the residue was a specific gift. This is founded on the supposition that the testator has disposed of it as a particular fund. There may be many cases*where residuary [*529] clauses must be considered, not as general dispositions of the residue, but as dispositions of the residue of a particular fund; and such gifts would be equally specific with gifts of other parts of the fund. In an ordinary gift of the residue, part to A. and part to B., and the residue to C., C. is as much a

specific legatee as either of the former legatees A. or B. But this is a general gift of the residuary estate. What, then, is a residuary estate? That which remains after payment of the debts. The testator gives it discharged from his debts; but he cannot do that, unless he provides for the payment of them by other means. Therefore, if he has expressed an intention of doing what he is incapable of effecting, it must fail."

When mortgaged Estates are entitled to be exonerated.—The law upon this subject has been materially altered by 17 & 18 Vict. c. 113. It is proposed, therefore, to consider, first, the law as applicable to cases not coming within the Act; and then to notice the Act itself, and the alterations which it has effected.

First, then, as to cases not coming within the operation of the Act: it is clear that in accordance with the general rule, that the personal estate is the primary fund for payment of debts, unless by express words or manifest intent it is exempted, the personal estate is the primary fund for payment of a mortgage debt *contracted by a deceased person himself*; and, whether the estate descends or is devised, the heir-at-law in the one case, and the devisee in the other, is entitled to have the land exonerated from the mortgage debt by the primary application of the general personal assets, so far as they will extend, unless, in the case of a devise, it appears from the will to have been the testator's intent that the land should be taken cum onere. See *Davies v. Bush*, 4 Bligh, N. S. 305, and note.

Although, as before observed, a devise or charge for payment of debts generally, will not render the real estate primarily liable, it seems that a devise of land in mortgage charged with, or in trust to sell for, payment of the mortgage debt, although it be the testator's own debt, will show his intention to exonerate the personalty, and render the mortgaged estate primarily liable: *Evans v. Cockeram*, 1 Coll. 428; *Hancox v. Abbey*, 11 Ves. 179. So where there is a devise to a person of an estate "he paying the mortgage thereon:" *Lockhart v. Hardy*, 9 Beav. 379. See also *Mead v. Hide*, 2 Vern. 120; *Bridgeman v. Dove*, 3 Atk. 201.

But a devise *subject* to the mortgage or incumbrance thereon, is not considered indicative of an intention to render the real estate primarily liable, but merely descriptive *of the state of the property; it will not, therefore, [*53] exonerate the personal estate: *Serle v. St. Eloy*, 2 P. Wms. 386; *Astley v. The Earl of Tankerville*, 3 Bro. C. C. 545; S. C., 1 Cox, 82; *Milnes v. Slater*, 8 Ves. 306; *Boote v. Blundell*, 1 Mer. 227; *Noel v. Lord Henley*, Dan. 336; *Goodwin v. Lee*, 1 K. & J. 377. See also *Wythe v. Heniker*, 2 My. & K. 635; *Bickham v. Crutwell*, 3 My. & Cr. 763.

In the principal case, indeed, Lord Thurlow says, that, as the testator had positively given the leasehold estate *subject* to the debt thereon, if another estate had been appropriated to payment of his debts, and it had been *his debt* upon the estate, he should have concurred with the Lords Commissioners in thinking the debt a primary charge on the estate. But Lord Eldon has observed, in *Boote v. Blundell*, 1 Mer. 227, with reference to the remark of Lord Thurlow, that "if, in *The Duke of Ancaster v. Mayer*, the mortgage

debt of 6500*l.* upon the leasehold estate devised to the testator's brother, had been a debt of the testator's *own*, it seems to be very certain, from *Serle v. St. Eloy*, 2 P. Wms. 386, and other cases, that his giving the leasehold estate *subject* to the mortgage would not have constituted it the primary fund for payment of that debt." See, also, *Galton v. Hancock*, 2 Atk. 437; *Astley v. Tankerville*, 3 Bro. C. C. 545; 1 Cox. 82; *Bickham v. Cruttwell*, 3 My. & Cr. 763.

Where, however, the mortgage debt is not the personal debt of the devisor or ancestor, but of a previous owner of the mortgaged estate, the mortgaged estate is the primary, and the personal estate merely the auxiliary and collateral fund for its payment; and consequently the heir-at-law or devisee, will take such estate cum onere, unless the mortgage debt has *been adopted* by the devisor or ancestor as his own, in which case the rule, that the personal estate is the primary fund for its payment applies: *Scott v. Beecher*, 5 Madd. 96. And see *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688.

What Acts do not amount to an Adoption of a Mortgage Debt by the Owner of the Estate.—There is considerable difficulty in ascertaining what acts amount to an adoption of the debt. The following acts have been held not to be sufficient:—If the heir or devisee, upon a transfer of the mortgage, enters into a personal covenant with, or executes a bond to, the new mortgagee for the payment of the mortgage debt, if he does it only for that purpose, it has been frequently determined not to make it the personal debt of the party whose original debt it was not: (*Bagot v. Oughton*, 1 P. Wms. 347; *Evelyn v. Evelyn*, 2 P. Wms. 664; see Cox's note, *Leman v. Newnham*, 1 Ves. 51; *Lacam v. *Mertins*, 1 Ves. 312; *Robinson v. Gee*, 1 Ves. 251; *The Earl of Ilchester v. The Earl of Carnarvon*, 1 Beav. 209; *Hedges v. Hedges*, 5 De G. and Sm. 330; and see and consider *Barham v. Earl of Thanet*, 3 My. & K. 607; *Bruce v. Morice*, 2 De G. & Sm. 389;)—nor if, as in the principal case he obtains a *small* further advance, and gives an additional real security for the whole sum due;—nor where he has entered into a covenant to pay a higher rate of interest, (*Shafto v. Shafto*, 2 P. Wms. 664, n.; 1 Cox, 207; sed vide *Woods v. Huntingford*, 3 Ves. 128; *Lushington v. Sewell*, 1 Sim. 435;)—nor where he obtains an additional advance to pay off arrears of interest on a mortgage and the simple contract debts of the person from whom he takes the estate, (*Earl of Tankerville v. Fawcett*, 1 Cox, 237;)—nor will a mortgage by the heir or devisee of lands, devised or descended, subject to payment of the debts or legacies of the ancestor or devisor, in order to secure their debts or legacies, be considered as the debt of the heir or devisee; *Perkyns v. Baynton*, 2 P. Wms. 665, Cox's note; *Bassett v. Percival*, 1 Cox, 268; *Noel v. Lord Henley*, 7 Price, 241; S. C., Dan. 211; *Hamilton v. Worley*, 2 Ves. jun. 62; *Earl of Tankerville v. Fawcett*, 1 Cox, 237; 2 Bro. C. C. 57. Nor will a charge by an heir or devisee of his estate with payment of his debts be considered as an adoption of the mortgage debt of his ancestor or the devisor from whom he took the estate; *Lawson v. Lawson*, 3 Bro. P. C. Toml. ed. 424; *Hamilton v. Worley*, 2 Ves. jun. 62; 4 Bro. C. C. 199; *Lawson v. Hudson*, 1 Bro. C. C. 58.

Where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer the debt from the estate to himself, as between his heir and his executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage—that is, indemnifies the vendor against it—he does not, by that act, take the debt upon himself personally: *Woods v. Huntingford*, 3 Ves. 132, per Sir R. P. Arden, M. R.; and although he agrees or covenants with the vendor to pay the mortgage debt, he does not thereby make it his own debt, but it remains a charge upon the estate, or rather a debt of his in respect of the estate only: *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152; *Butler v. Butler*, 5 Ves. 534; *Barry v. Harding*, 1 J. & L. 475. Sed vide *Parsons v. Freeman*, 2 P. Wms. 664, Cox's note.

What acts amount to an Adoption of a Mortgage Debt by the Owner of the Estate.—The following acts have been held to amount to an adoption of the debt:—*Where the purchaser of the equity of redemption enters [*533] into a covenant with the mortgagee to pay him the mortgage debt, and there is a new proviso for redemption on payment, he will be considered to have adopted the debt as his own: *Earl of Oxford v. Lady Rodney*, 14 Ves. 417; *Woods v. Huntingford*, 3 Ves. 128; *Barry v. Harding*, 1 J. & L. 485, 486.

Again, if a person bought an estate, and thereby contracted a debt with the vendor, and, for the purpose of securing it, gave a charge on the estate, and entered into a covenant to pay it, it would be the personal debt of the purchaser, and his personal estate would be primarily liable to pay it. And it will make no difference whether the purchase-money was to be paid in a gross sum or from time to time, by way of annuity for life; it is equally a debt and charge upon the personal estate, and in either case the personal estate is the primary fund to pay it. *Yonge v. Furze*, 20 Beav. 380, 383. But although the mere purchase of an estate subject to charges as an equity of redemption, does not make the personal estate of the purchaser liable to the charge, if the charge is part of the price, then the personal estate is liable.—Per Lord Thurlow, C., in *Billinghurst v. Walker*, 2 Bro. C. C. 608, recognizing the doctrine laid down in *Cope v. Cope*, Salk. 449; and *Belvidere v. Lord Rochfort*, Wallis Rep. by Lyne, 45; 5 Bro. P. C. 299, Toml. ed. Sed vide *Tweddell v. Tweddell*, 2 Bro. C. C. 107, where Lord Thurlow disapproves of that case. See also *Woods v. Lord Huntingford*, 3 Ves. 131. And see and consider *Waring v. Ward*, 7 Ves. 337; *Barry v. Harding*, 1 J. & L. 475.

Where a mortgaged estate comes into the hands of a person who is executor and residuary legatee of the mortgagor, as well as heir or devisee of the mortgaged estate, upon the death of such person the mortgage debt is a primary charge on the real estate. The leading case upon this subject is *Scott v. Beecher*, 5 Madd. 96; there the owner of copyholds, which he had mortgaged, devised them to his wife in fee, and gave to her his personal estate, and made her his residuary legatee and executrix. The wife died intestate without paying off the mortgage. It was held by Sir John Leach, V. C., that her heir was not entitled to have the mortgage paid out of the personal estate. "The

widow," said his Honor, "was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted she possessed assets sufficient to pay all the debts, including the mortgage, and *it may therefore be said that she elected to continue the mortgage as a charge on her real estate.* But I apprehend this is [*534] not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of the testator became her personal estate, but the mortgage debt of the testator was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate." So likewise in the recent case of *Swainson v. Swainson*, 6 De G. Mac. & G. 648, a testator who had mortgaged his estates, gave all his real and personal estate to his wife, and made her executrix. She died without having paid off the mortgages. It was held by Lord Cranworth, C., affirming the decision of Sir J. Stuart, V. C., that her heir took the mortgaged estates cum onere. "Some propositions," said his Lordship, "connected with the case admit of no doubt. If the owner of an estate mortgaged it and died, and the representative of his real estate was a different person from the representative of his personal estate, in this case the real estate would be exonerated from the debt at the expense of the personalty. Again, where the real and personal representative of the mortgagor was the same person, no question could arise. What, however, was to happen if the estate having come to some person, that person died, and his representatives were different, his real estate going to one person and his personal to another? It was here that the question arose. Without saying whether there might be a preference in 'favor of the rule being' one way rather than another, the only point of importance was that some rule should be established. I have always understood the rule to be that when an estate in mortgage had once come to the hands of a person filling the character both of real and personal representative of the mortgagor, then the charge became a debt of that person, and was only an incumbrance on the estate. That was the rule laid down in *Scott v. Beecher*, and it was acted on by Lord Lyndhurst in *Evans v. Smithson*, (cited 1 Y. & C. C. C. 701.) The particulars of that case were not known, but the rule was also followed by Lord Langdale in *The Earl of Ilchester v. The Earl of Carnarvon*, 1 Beav. 209; and again, although with reluctance, by the present Lord Justice Knight Bruce in *The Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; it was again recognized and followed by Lord Truro in *Hickling v. Boyer*, 3 Mac. & G. 635, 644."

It has, however, been recently decided that where the same person becomes entitled to the mortgaged estate, and also to the personal estate of the mortgagor upon his intestacy, on the death of such person intestate, without having taken out letters of administration, *his heir will be entitled to [*535] have the mortgaged estate exonerated. See *Bond v. England*, 2 K. & J. 44; there James England mortgaged real estate, and died intestate in 1850, leaving his father, Edward England, heir-at-law, and sole next of kin. Edward England died intestate, and without having obtained letters of admi-

nistration of the personal estate of his son. It was held by Sir W. Page Wood, V. C., that the personal estate of the son was liable, as between the heir and personal representative of the father and son, to be applied in discharge of the mortgage debt in exoneration of the real estate. "It appears to me," said his Honor, "that the authorities which have decided that when the same person who is heir or devisee of the mortgaged estate is also executor and residuary legatee, and has both the funds and the legal right to pay himself, his heir is not entitled to have the mortgaged estate exonerated, do not go far enough to enable me to hold that the administrator of Edward, who was entitled only to so much of the entire personalty of James as fell to him by the effect of intestacy after all the debts of James were paid, can claim James's personalty until the mortgaged debt is discharged, or to hold even if the mortgagee had chosen to sell the security, so that the debt had been in a manner discharged; that the defendant, claiming as heir of James as well as of Edward, has not a right to say 'the personalty of James never came to Edward, it remains unadministered, and I am entitled to have it applied in relieving the mortgaged estate from James's debt.' The case is new in this particular. The views on the general doctrine have been very various; but the later decisions have proceeded upon the ground that the same party had both funds under his control. I cannot say that this was the case here, and I must therefore decide in favor of the defendant, who applies to have the mortgaged estate exonerated."

In *Hatch v. Skelton*, (20 Beav. 453,) a testatrix, the owner of a freehold estate, subject to a mortgage in fee to secure £1300, devised and bequeathed her real and personal estate to Angell, the mortgagee, who in his residuary account as her executor, represented the balance of the estate as being £467, and added, "The executor will appropriate this balance towards payment of the mortgage of £1300 due to himself." Afterwards Angell devised the estate to a niece and two sisters of the testatrix, "provided they undertake to receive the same with all the liabilities attaching thereunto." It was held by Sir John Romilly, M. R., first, that under the circumstances the mortgage [*536] had not merged in the fee; and, secondly, that the niece and two sisters of the testatrix took the estate subject to the payment of the balance of the mortgage debt. See also *Byam v. Sutton*, 19 Beav. 556.

Again, where the money due upon mortgage is a mere charge, in order to secure a portion of jointure, although accompanied by a covenant to pay on the part of the owner of the estate, it will be held to be a debt to which the estate charged, and not the personal estate, will be primarily liable. See *Coventry v. Coventry*, 2 P. Wms. 222; 1 Stra. 596; *Edwards v. Freeman*, 2 P. Wms. 437; *Lanoy v. The Duke of Athol*, 2 Atk. 444; *Lechmere v. Charlton*, 15 Ves. 193; and *Loosemore v. Knapman*, Kay, 123: there a man by his marriage settlement covenanted to secure his intended wife an annuity by way of jointure "in manner thereafter expressed," and he demised certain real estate to trustees for a term, upon the trusts thereafter declared; and then covenanted that his heirs, executors, administrators, or assigns should pay the jointure to the wife, and it was thereby declared that the demised lands were

to be held upon trust for the settlor until some default in making any of the payments of the jointure; and in case of non-payment of any part for forty days next after any day of payment, then upon trust to secure the same. It was held by Sir W. P. Wood, V. C., that as between the real and personal representatives of the settlor the land was the primary fund for the payment of the jointure. "I think," said his Honor, "there is a distinction to be found in the cases; that I am bound in principle to hold that this is a charge primarily on the real estate. First of all, there is a decision of Lord Hardwicke in *Lanoy v. The Duke of Athol*, 2 Atk. 444. I believe there are prior cases, but that is the leading case on the subject. He says in effect that although where there is a covenant for payment the personal assets are first charged, this is not extended to provisions in a settlement, and the ground must be that pointed out in *Lechmere v. Charlton*, 15 Ves. 193, that in a security of this description *there is not any benefit accruing to the personal estate of the party who is debtor*, but the whole arrangement is merely for the purpose of securing a jointure or portion, and the *personalty not having received any benefit*, the true intent is that the real, and not the personal estate should be the primary fund. That was the ground of the decision in *Graves v. Hicks*, 6 Sim. 398. In that case there was an agreement to secure a sum of £6000 by way of mortgage, and the Vice-Chancellor takes a distinction which is nice, but of some importance as to what would have been the effect if the wording there had been different—if it had been an agreement to *pay*, and not to *secure*, the £6000. The use of *the word 'pay' might have [*537] been evidence of an anterior debt, as the question was, whether it was a debt at the time of the settlement. . . . I rely upon the decision of *Lanoy v. The Duke of Athol*, and the view which the Vice-Chancellor took in asking in *Graves v. Hicks*, whether any debt was due at the time? Asking the same question here, and it appearing that there was no debt, and no augmentation of the personal estate, I must hold, according to the authorities, that the transaction is to be regarded as a security made by the settlor upon his marriage, in which his personal estate taking no benefit, the onus is thrown upon those who wish to make it liable to show some reason for doing so." See the remarks of Lord Truro, C., in *Hickling v. Boyer*, 3 Mac. & G. 642, 643; and see and consider *Reeve v. Reeve*, 3 De G. & Sm. 714.

But even where the personal estate has received a benefit, the real estate will be primarily liable where a tenant for life, even although he has an absolute power of appointment over the whole estate, raises a sum of money under the power for his own use, and covenants to pay it; for the inference in such a case is, that he intended the real estate, which was not absolutely his own, should pay the debt in preference to his own property. *Jenkinson v. Harcourt*, Kay, 688, 700. As to what would be the effect of the tenant for life becoming absolute owner by the failure of intermediate limitations, see *Scott v. Beecher*, 5 Madd. 96; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Noel v. Lord Henley*, Dan. 331, 332; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 711.

Where a person has raised money by mortgage of an estate, which he after-

wards aliens or settles upon volunteers, and more especially if he does so expressly subject to the mortgage, the natural inference from such a transaction, unless there be something in the instrument to indicate a contrary intention, is that the alienor or settlor did not mean to pay the debt out of his personal estate. If the alienation be made subject to the mortgage debt, whether the alienee be a volunteer or purchaser, the inference is, that though as between the real and personal representatives of the mortgagor, his real estate was intended to be only a collateral security, yet from the moment of alienation he has made that estate the principal debtor, (*Vandeleur v. Vandeleur*, 3 C. & F. 82; 9 Bligh, N. S. 157; *Lewis v. Nangle*, 1 Cox, 240; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Lady Langdale v. Briggs*, 26 L. J., N. S. 27;) and if he were to pay off the whole or any part of the charge upon the real estate, he would, [*538] unless he showed that he intended to make *the payment in case of the real estate, be a creditor for the amount he so paid off, (*Ex parte Digby*, Jac. 235; *Redington v. Redington*, 1 B. & B. 131; *Vandeleur v. Vandeleur*, 3 C. & F. 82; 9 Bligh, N. S. 157;) but where the settlement contains a covenant on the part of the settlor to pay the debt, that might show his intention to render his personal estate primarily liable. See *Noel v. Noel*, 12 Price, 263, 264; *Barham v. Earl of Clarendon*, 10 Hare, 126.

As to the effect of lapse of time upon the claim to exoneration, see *Newhouse v. Smith*, 2 Sm. & Giff. 344; *Rooke v. Lord Kensington*, 21 Beav. 470; *Mellersh v. Bridger*, 17 Jur. 908.

The law relating to the exoneration of mortgaged estates having been found unsatisfactory, it has been enacted by 17 & 18 Vict. c. 113, (which does not extend to Scotland,) that "when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate, or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise; provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five." Sect. 1.

It will be observed that this Act only comprehends "any estate or interest in any land or other hereditaments," the law therefore will remain unaltered

as to the primary liability of the general personal estate, to satisfy charges on property not coming within those terms.

Moreover, the operation of this Act is confined to "cases where land is *charged with the payment of any sum of money by way of mortgage,"—language which leaves it not quite free from doubt what the [*539] Courts may deem to come within its meaning. It has, however, been held that the vendor's lien for unpaid purchase-money does not do so; *Hood v. Hood*, 5 W. R. 747, V. C. S.

In what order assets are applicable in the exoneration of mortgaged estates.]—Where a devisee is entitled to have the estate exonerated from the mortgage debt by the assets of the testator, they will be applicable in the following order:—1st. The general personal estate: *Philips v. Philips*, 2 Bro. C. C. 273. 2d. Lands expressly devised for payment of debts: *Serle v. St. Eloy*, 2 P. Wms. 386; *Philips v. Parry*, 22 Beav. 279. 3d. Lands descended to the heir: *Galton v. Hancock*, 2 Atk. 424, 427, 430; *Lomax v. Lomax*, 12 Beav. 285. And 4th. Lands devised charged with debts: *Davies v. Topp*, 2 Bro. C. C. 259: and in this last case all the devisees (including the devisee of the mortgaged estate, *if so charged*,) must contribute pro rata towards payment of the mortgage debt: *Carter v. Barnardiston*, 1 P. Wms. 505; *Middleton v. Middleton*, 15 Beav. 450; [*Elliott v. Carter*, 9 Grattan, 541.] Secus, if other devised estates are not charged with debts: *Galton v. Hancock*, 2 Atk. 482; *Emuss v. Smith*, 2 De G. & Sm. 722. Nor is the devisee entitled to have the estate exonerated out of the personalty, as against specific legatees; (*O'Neal v. Mead*, 1 P. Wms. 693; *Emuss v. Smith*, 2 De G. & Sm. 737, 738;)—nor as against pecuniary legatees; (*Lutkins v. Leigh*, Ca. t. Talb. 53; *Johnson v. Child*, 4 Hare, 87;)—nor as against a widow's paraphernalia; (1 P. Wms. 730;)—nor, *à fortiori*, as against creditors. See *Hamilton v. Worley*, 2 Ves. jun. 65, where Lord Loughborough observes, "The equity of the Court affords to a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate, can go no farther than this:—as between the heir or devisee of the estate and residuary legatee, it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interests of creditors."

The heir, where an estate descends subject to a mortgage, is entitled to exoneration, first, out of the general personal estate; and, lastly, out of real estates expressly devised for payment of debts: *Hill v. Bishop of London*, 1 Atk. 621.

The election of the mortgagee to come upon the personalty for payment of the mortgage debt will not determine what fund shall be ultimately charged with it; for, under the ordinary rule of marshalling the simple contract creditors, *the widow or legatees would have a right to stand in his place [*540] for so much of the real estate as he should take out of the personal. They will not, therefore, be prejudiced, nor will the devisee be benefited by the election of the mortgagee to proceed, as he undoubtedly may, against the personal estate in the first instance.

It is a well settled principle, in this country, that, in the administration of assets, the personal estate is the natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted, before the real estate can be made liable; and it will not be exonerated by a charge on the real estate, unless there be express words, or a plain intent, in the will, to make such exoneration; *Lupton v. Lupton*, 2 Johnson's Chancery, 614, 628; *Livingston v. Newkirk*, 3 Id. 312, 319; *M'Kay v. Green*, Ib. 56; *Rogers v. Rogers*, 1 Paige, 188, 190; *Morris v. Mowatt*, 2 Id. 587, 591; *Mollan v. Griffith*, 3 Id. 402, 404; *Hancock v. Minot*, 8 Pickering, 29, 37; *Ruston et al. v. Ruston*, 2 Yeates, 54, 63, 65; *Todd v. Todd's Executors*, 1 Sergeant & Rawle, 453, 457, 458; *Martin and another v. Fry*, 17 Id. 426, 429; *Miller v. Harwell and Johnson*, 3 Murphy, 195, 201; *M'Loud v. Roberts et al.*, 4 Hening & Munford, 443; *Foster and Wife, and others v. Crenshaw's Executors*, 3 Munford, 514; *Waring v. Waring*, 2 Bland, 673, 675; *Wyse et al. v. Smith and Buchanan*, 4 Gill & Johnson, 296, 302; *Chase v. Lockerman*, 11 Id. 186, 203; *Marsh's Heirs v. Marsh's Devisees*, 10 B. Monroe, 360. See *post*, vol. 2, note to *Aldrich v. Cooper*. If both the personal and real estate be expressly charged with the payment of debts, they do not become liable, equally, but the personalty must first be exhausted, before the land can be sold; *Hoye v. Brewer and Troup*, 3 Id. 153, 157; *Leavitt v. Wooster*, 14 New Hampshire, 551, 564; *Sims v. Sims*, 2 Stockton's Chancery, 158; *Clinefelter v. Ayers*, 16 Illinois, 329. See *Hays et al.*,

Executors, v. Jackson et al., 6 Massachusetts, 149, 151; *M'Campbell v. M'Campbell*, 5 Monroe, 92, 102. And the same rule holds good, with reference to a charge of legacies; *Sims v. Sims*, 2 Stockton's Ch. 158; *Canfield v. Bostwick*, 21 Conn. 550. But when real and personal property are blended together in one fund, and charged with a common burden, the right of the realty to exoneration, at the expense of the personalty, will cease, and each will be compelled to contribute equally; *Elliott v. Carter*, 9 Grattan, 541, 553.

Though a mere charge upon lands will not render them the primary fund, yet lands descended, or devised to be sold, or devised on condition that the devisee shall pay the testator's debts, will be liable in preference to personalty specifically bequeathed. But this result will not follow from a direction that the land shall be sold for the purpose of paying legacies, or of distributing the proceeds among persons designated by the testator, nor unless the object of the sale be to provide a fund for the payment of debts; *Martin v. Fry*, 17 S. & R. 426.

Lands descended are certainly liable before specific bequests of personalty; *The Commonwealth v. Shelby*, 13 Sergeant & Rawle, 348; *Warley v. Warley*, 1 Bailey's Equity, 398.

In *Robards v. Wortham*, 2 Devereux's Equity, 173, where this point was decided, the general principle as to the kind of appropriation of land for the payment of debts, which will render such land primarily liable, was very clearly stated. "If lands be devised to be sold for the express purpose of paying debts," said Ruffin, J., in delivering judgment, "and the surplus given away as money, there can

be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund. For the residue is not given there in its general sense, after payments of debts; but it means the residue of the personal property after taking out such parts as are before given away. But where lands are merely *charged*, a question arises, are they to pay before or after the personalty? And the general rule is, that unless the contrary clearly—formally, expressly—appear, the personal estate is to be first exhausted, and the real is only auxiliary; the charge being considered as an act of honesty in the testator, to have his debts of all sorts certainly and speedily paid; and not to change the fund in the first instance, to which resort is to be had. The law fixes the burden on the personalty, and that can only be altered by the testator. And the intention on his part to alter it, is not inferred upon slight grounds. Charging the land is not sufficient. However anxiously it is done, that will not of itself, have the effect of exempting the personalty, says Lord Rosslyn, in *Taitt v. Northwick*. And Lord Thurlow says, in *Samwell v. Wake*, (1 Bro. C. 144,) and at several other times, that the testator must not only charge the real estate, but must show his purpose that the personal *should not* be applied, before the latter will be exempted. Many minute criticisms on wills have been made, to ascertain the intention in this respect. The final result of the discussions has been, that unless the personalty, although specifically bequeathed, be expressly or clearly exonerated by other parts of the will, a charge upon the lands will not have

that effect. The reason is, that after one fund becomes fixed with the debts or a particular debt, that fund can be relieved only by plain words postponing its liability, and substituting another fund in its place. A *general* charge will not do; because that may *as well* be considered the creation of an additional fund, in aid of that already liable, as the provision of a sole fund for the payment of debts. But it is entirely different, where the personalty is specifically bequeathed, and the lands *descend*. So essentially different are the cases, that I should not have felt bound to notice at large those cases, of a *charge*, but for the purpose of exhibiting clearly their leading principle.

“That principle is, that the order of liability once existing between two funds can be changed only by the intention of the testator; and to show such intent, express or plain words are indispensable, so as to make the intent manifest.

“Where lands descend, they, as well as the personalty, constitute a primary fund for the satisfaction of specialty debts and specific liens. And the testator, by giving away the personalty by specific bequests, is held to show his intention, that the land shall bear its own burden unassisted. Hence that may be called the order, in which by law those funds, thus situated, are to pay. That order will not be disturbed, but upon a plain intent: as if the land be devised to the heir. He takes indeed as heir, because the better title. Yet as denoting the intent, he shall for this purpose be considered as a devisee; who always holds exempt from debts, until *all* the personalty is exhausted, unless the devise be for the payment of debts,

or there be a *charge* in terms which placed the land in front of the personalty. No doubt the whole is under the testator's control; and he may even effectually declare, that lands descended shall be eased by his general personal residue, or even his particular legacies. But it will be admitted by every one, after considering the before mentioned cases, and the principle on which they are founded, that to do that, the words must be indeed strong." In the subsequent case of *Palmer v. Armstrong*, 1b. 268, these views were again affirmed, and it was declared that the mere circumstance of charging land with the payment of debts did not render it primarily liable.

In like manner, a specific bequest of all the personalty, and a devise of land under the condition that the devisee pay all the testator's debts, will render the land the primary fund, to the exemption of the personalty, even if the devisee refuses the land upon those terms; because the intent of the testator is sufficiently manifested; *McFait's Appeal*, 8 Barr, 290. "In order to exonerate personal estate from the payment of debts," said the court, "there must be either express words or a plain intention, as it is the primary fund. But the intention may be found, not only in the mode in which the personal estate is given but also in the manner of the devise of the real estate. The real estate may be so appropriated to the payment of debts and legacies, as to show a clear intention that they shall not be a burden on any other fund, although the personal estate is not expressly exempted." The opinion of the judge, perhaps, was, that the mere form of the devise was enough to exonerate

the personalty, even if the latter had not been specially bequeathed; but the case is not an authority for such a position.

But if the personalty be bequeathed generally and not specifically, it will not be exempted in preference to descended land, unless an intention to that effect be disclosed in the will. In the *Case of Walker's Estate*, 3 Rawle, 229, there was a bequest to the testator's widow of "all his household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to him, and all his other personal estate of what nature or kind soever;" but it was decided that this personal property was liable to debts in preference to after-acquired lands. "In order to exonerate this personal fund," said the court, "the will must contain express words for that purpose, a clear, manifest intention, a plain declaration, or a necessary inference, tantamount to express words. The question, in each particular case of exemption, resolves itself into this: Does there appear from the whole testamentary disposition, taken together, an intention on the part of the testator, so expressed, as to convince a judicial mind, that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided."

The rule in regard to the primary liability of personal estate, is to a considerable extent, the same in regard to legacies as to debts; *Sims v. Sims*, 2 Stockton's Ch. 158; but the New York cases recognize a distinction as to exoneration by an express bequest

of the whole personalty. "I agree with the present Lord Chancellor of Ireland," said the chancellor, in *Hoes v. Van Hoeson*, 1 Barbour's Chancery, 380, 400, "that the soundest and most sensible rule of construction, both as to debts and legacies, would have been, that if there are express words of dedication of a portion of the real estate for the payment of debts or legacies, and the testator has disposed of all his personal estate specifically, the fund which the testator has himself provided for the purpose should be deemed the primary fund. The current of authorities, however, is certainly the other way, so far as relates to the payment of debts, at least. It is also the general rule that the personal estate is the primary fund for the payment of legacies, although such legacies are charged upon the real estate; whether such real estate be devised with a direction to the trustee to pay the legacies, or is charged with such legacies, or given to trustees for that purpose. But in reference to legacies, an absolute disposition of all the personal estate of the testator, and not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty in exoneration of the personalty. Thus in the case of *Kelsey v. Dego*, (3 Cow. Rep. 133,) where the testator bequeathed his whole personal estate, after payment of debts, to his wife for life, with remainder to all his children at her death, and then devised all his real estate to his son N. in fee, subject to certain privileges therein, in favor of the widow; and directed him to pay certain legacies, one-half thereof in two years after the testator's death and the other half in two years after the death of the widow; and

made the devisee and other persons executors; the Supreme Court held that it was manifest from the will that he meant to exonerate the personal estate. But in the subsequent case of *Tole v. Hardy*, (6 Cow. Rep. 333,) where the testator directed that his widow should be maintained out of his estate, and that she should have all his furniture, &c., and then devised his real estate to his son in fee, and directed him to pay certain legacies, and appointed the widow executrix, and the devisee the executor of the will; and the same court held that the personal estate, not specifically bequeathed, was not exonerated, and was the primary fund for the payment of the legacies; although the devisee was also charged with the payment, in respect to the land devised to him. And I have not been able to find any case, where the personal estate was not in terms exonerated, or the legacies declared to be chargeable upon the real estate exclusively, in which an interest in personal property not disposed of by the will was held to be exonerated. On the contrary, it appears to be settled, that where the personal estate is in terms exonerated, for the benefit of a particular legatee, and not for the benefit of such estate generally, the failure of the particular bequest destroys the exoneration *pro tanto*." "The mere making of a provision for the payment of debts or legacies out of the real estate," said Jewett, Ch. J., in the same case in the Court of Appeals, where the decree of the chancellor was affirmed, "does not discharge the personalty. There must be an intention not only to charge the realty, but to *exonerate* the personalty; not merely to supply another fund,

but to substitute that fund for the property antecedently liable. Thus, in numerous cases, it has been held that neither a charge of debts on the testator's lands *generally*, or on a specific portion of them, nor a devise upon trust for sale, however formally or anxiously framed, nor the creation of a term of years for the purpose of such charge, will *exonerate* the personality. Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts and legacies, or the like. In all these cases, the charge upon the realty, or the condition that the devisee shall pay as directed, is deemed and taken to have been made in *aid* of the primary fund, and not in *exoneration* of it, unless there is an *absolute* disposition of all the personal estate of the testator; in such case, the intent of the testator to charge the realty in exoneration of the personality, is sufficiently manifested." *Hoes and others v. Van Hoesen*, 1 Comstock, 120, 123. See *post*, vol. 2, note to *Aldrich v. Cooper*.

It is well settled, that if a person borrows money, and gives his bond and mortgage for the debt, the mortgage is merely a collateral security for the personal obligation, and the heir or devisee may call upon the executor to exonerate the land, by an application of the personal assets to the discharge of the mortgage: see *Case of Keyzey, Jr.*, 9 Sergeant & Rawle, 71, 73; *Cumberland v. Codrington*, 3 Johnson's Chancery, 229, 257; *Ruston et al. v. Ruston*, 2 Yeates, 54; *Hewes v. Dehon*, 3 Gray, 205; *Mansel's Estate*, 1 Parson's Equity, 367; *Goodburn v. Stevens*, 1 Maryland, Chancery, 420. This, however, is

now altered in New York, by the Revised Statutes, which enact that "whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage, out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid." 1 R. S. p. 749, s. 4; see *Mollan v. Griffith*, 3 Paige, 402, 404; *House v. House*, 10 Id. 159, 164.

But the distinction between mortgage debts originally contracted by the testator, and those contracted by another, is also established in the American cases; and it is agreed, that in the latter case, the land is considered as the debtor and shall bear its own burden. If A. purchases an estate subject to a mortgage, and dies, his personal estate shall not be applied to the exoneration of the land, unless he has done some act by which he has created a new and original liability in himself; *Case of Keyzey, Jr.*, 9 Sergeant & Rawle, 71, 73. The nature of the act or promise by which the purchaser of lands subject to an incumbrance, makes his personal assets liable, was very thoroughly discussed with an examination of all the cases, by Chancellor Kent, in *Cumberland v. Codrington*, 2 Johnson's Chancery, 229, 257, 272. "The question," says the chancellor, in that case, "seems to be, not merely whether the purchaser has rendered himself liable at law to a suit by the creditor, but which estate is to be deemed the primary fund, and which only the auxiliary. When a man gives a bond and mort-

gage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estate. There is good sense and justice in the principle; and I feel the force of the doctrine, that it requires very strong and decided proof of intention, before the court can undertake to shift the natural course and order of obligations between the two estates.

“Lord Thurlow, in *Ancaſter v. Mayer*, ſeemed inclined to think, that in *Evelyn v. Evelyn*, the ſon by his covenant had made the debt his own, and he ſuppoſed the idea of the court muſt have been, that the covenant was by way of accommodating the charge, and not of making the charge his own. But there are ſo many caſes, and even ſome decided by Lord Thurlow, in which a mere bond or covenant to the mortgagee will not, of itſelf, and without other circumſtances, ſhift the charge, that I ſee no ground for ſurpriſe at this commanding deciſion.

“The reſult of the caſes ſeems to be, that as to wills, the teſtator may, by expreſs directions, charge ſuch an incumbrance upon his perſonal aſſets, or even without expreſs words, he may do it by diſpoſitions and language that

are tantamount; as if, for inſtance, the continuance of the charge primarily on the land would be repugnant to ſome of the provisions in the will and defeat them. As to other acts of the purchaſer in his lifetime, in order to charge his perſonal eſtate as the primary fund, he muſt make himſelf, by contract, perſonally and directly liable at law for the debt to the owner of the incumbrance; and even a covenant or bond for the purpoſe will not be ſufficient unleſs accompanied with circumſtances ſhowing a decided intention to make thereby the debt perſonally his own.”

Where premises are ſold, ſubject to a mortgage, as part of the conſideration-money, the grantee, as between himſelf and the grantor, is bound to pay, and is liable to an action on the part of the grantor for breach of contract in not paying; *Campbell v. Shrum*, 3 Watts, 60; *Trevor v. Perkins*, 5 Wharton, 244, 253; *Young v. Stone*, 4 Watts & Sergeant, 45; *Blank v. German*, 5 Id. 36; *Dubbs v. Finley*, 2 Barr, 397; (ſee *Walker v. Phyſick*, 5 Id. 193;) and in equity the grantee is, as between himſelf and the grantor, conſidered as the principal debtor, and the grantor as his ſurety entitled upon payment, to all the privileges of that character; *Marſh v. Pike*, 10 Paige, 595; *Cornell v. Preſcott*, 2 Barbour, S. C. 17, 18; but the grantee does not become perſonally liable to the mortgagee without ſome promiſe or engagement made to him; *Dorr v. Peters*, 3 Edwards, 132, 133; *Kearney v. Tanner*, 17 Sergeant & Rawle, 94, 97; *Daniel v. Leitch*, 13 Grattan, 195. “There is a diſtinction to be noticed running through the great maſs of caſes cited by Chancellor Kent, in *Cumberland v. Cod-*

ington," said the Vice-Chancellor in *King v. Whitely and others*, Hoffman, 477: "one class of the cases is where the assumption of the debt is undeniable, but it still remains to decide whether the land must first be resorted to. The other class is, where the question arises whether any assumption has been made. Chancellor Kent states that the cases all agree that no covenant with the mortgagor is sufficient to make the debt a personal one of the purchaser. There must be a direct communication and contract with the mortgagee."

There are, therefore, three distinct classes of cases, in regard to the liability of the purchaser of mortgaged premises. 1. Where he becomes personally liable to his vendor for the payment of the mortgage money, though liable to the mortgagee only in respect of the land. 2. Where he makes himself personally liable to the mortgagee, yet so that after his death his general personal estate is liable only as surety for the land, and therefore secondarily. 3. Where he substitutes his personal obligation as the primary debt, the land being liable only upon the failure of his personal assets.

[The result will be the same whether the title to the land was acquired by operation of law or by grant; and whether it had its origin in a gift or a purchase, the rule in all cases being that the obligations incurred by the former owners, shall not be regarded as the debts of those who succeed them, nor thrown, in the first instance, upon the personal assets of the latter, unless they have manifested their intention to make them primarily their own, and not merely in aid of, or for the purpose of

securing their hold on the land. *In re Taylor*, 8 Exchequer, 384; *Cumberland v. Codrington*, 3 Johnson's Ch. 229. Thus where land which had been mortgaged by A. and devised by him to B., was subsequently devised by B. to C., who was named as executor in the will, C. was held to have no right or authority to apply the assets of B. to the payment of the mortgage; because that would have been to take the property of one man to pay the debt of another; B. being as much a stranger to the obligation of A. as if he held no interest in the premises which had been mortgaged as a security for its fulfilment; *in re Taylor*. Indeed, the presumption against the application of the personality, would seem to be stronger when the land descends or is given, than when it is purchased; because, he who buys subject to a mortgage, with a proportionate abatement from the consideration for the sale, may be presumed to intend, if he be not bound to satisfy the mortgage, as the means and for the purpose of completing the purchase, and rendering that which he has bought absolutely his own; which cannot be said of an heir or devisee who takes by operation of law, or the bounty of the testator. Hence, the better opinion would seem to be, that a covenant for the payment of incumbrances, created by a deviser or ancestor, through or by whom the land has descended or been given to the covenantor, will be presumed to have been executed for the benefit of the land, and not for the purpose of charging the personality. This view was taken by the Supreme Court of the United States, in *M'Learn v. M'Lellan*, 10 Peters, 623, 644, and a judgment against Archibald M'Learn

for the purchase-money of a tract of land bought by him and subsequently devised to his son, James M'Learn, said to be a debt of the father and not of the son; although he had given a bond and mortgage as additional or collateral security for the judgment after the death of his father, in the hope of obtaining time for the payment of the judgment, and thus protecting the estate which he held under the devise. The case of *Cumberland v. Codrington*, 3 Johnson's Ch. 252, said M'Lean, J., who delivered the opinion of the court, shows "as between the representatives of the real and personal estate, that the land is the primary fund to pay off a mortgage. And in 2 Bro. 57, Lord Kenyon, as master of the rolls, laid down the same rule; that where an estate descends, or comes to one subject to a mortgage; although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed; yet that shall not bind his personal estate.

"There is no doctrine better established than that the purchase of land, subject to a mortgage debt, does not make the debt personal; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed where additional security has been given.

"In the case of *Evelyn v. Evelyn*, 2 P. Wms. 659; where A. mortgaged the land for 1500 pounds; and his son B. covenanted with the assignee of the mortgage to pay the money. He succeeded to the premises after the death of his father, and died intestate. The question was, whether his personal estate, under the covenant

should be applied in payment of the mortgage; and it was decided that the land should be charged, and the covenant was only considered as additional security.

"In the case of *Waring v. Ward*, 7 Ves. 334, Lord Eldon says: 'the principle upon which the personal estate is first liable in general cases is, that the contract primarily is a personal contract; the personal estate receiving the benefit: and, being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil that personal contract.' It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant, or simple contract debt, if there is neither bond nor covenant; his personal estate, if he dies, must pay the debt for the benefit of the heir. But suppose a second descent cast; and the question arises, the personal estate of the son, and his real estate, descended to the grandson: then the personal estate of the son shall not pay it, as it never was the personal contract of the son.

"And this is the well established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and, on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal: but if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor.

"And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a

court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees.

"In the case under consideration, the mortgage was given by James H. M'Learn, but it was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the extent of the judgment lien. And this judgment was obtained, chiefly, for the purchase-money of the estate. In effect, the debt for which the judgment was obtained against Archibald M'Learn, and for which the mortgage was given, constituted an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt for which the mortgage was given, was not the personal contract of James H. M'Learn, but the contract of his ancestor in the purchase of the estate. But if the contract was personal, and might have been a charge on the personal estate devised to James H. M'Learn, yet the character of the debt, in this respect, is changed in the hands of the present heirs. In the language of Lord Eldon, this debt cannot be a charge on the personalty, because it was not created by the personal contract of James H. M'Learn."

But the court went on to determine that, as the mortgage given by James M'Learn embraced the personalty which had descended to him from his father, Archibald M'Learn, as well as the land, it was a charge on both, and both should, therefore, be applied equally to the payment of the debt of the father.

The weight of authority would, therefore, unquestionably seem to be, that the personal estate will not be primarily liable, unless the testator has

not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has, in some other way, manifested an intention to throw the burden on the personalty in case of the land; *Keyser's Estate*, 9 S. & R. 371; 1 Parson's Eq. 379; *Halsey v. Reid*, 9 Paige, 173; *M'Learn v. M'Lellan*, 10 Peters, 625, 644; *In re Taylor*, 8 Exchequer, 384. A different view was, notwithstanding, taken in *Hoff's Appeal*, 12 Harris, 200, and a recital in a receipt for the purchase-money of land, subject to a mortgage, that the mortgage debt formed part of the consideration, and was to be paid by the purchaser, held to make the debt his own, and thus render it a charge on a residuary bequest of the personalty, in aid of a devisee of the land. The court were of opinion that the mortgage was, in equity if not at law, the debt of the purchaser, and that it should consequently be paid out of the personal property and not out of the land. It may be conceded that the vendor was entitled to exoneration at the expense of the land, and that the vendee was bound to come in aid of the land if insufficient; but the doubt would seem to be whether this obligation was not, in some measure, secondary, and whether it rendered the personal estate primarily liable; see *Mitchell v. Mitchell*, 3 Maryland Chancery, 71. *Hoff's Appeal* is, however, sustained by the recent case of *Thompson v. Thompson*, 4 Ohio, N. S. 333; and the purchase of an estate subject to a mortgage, which was deducted from the consideration, followed by a payment of interest to the mortgagee, held to convert the mortgage into the debt of the purchaser, and make it primarily pay-

able out of the personalty, in ease of a devisee of the land.

The rule which makes the personal property of the mortgagor the primary fund for the payment of a mortgage, only applies as between heirs or devisees on the one side, and distributees or residuary legatees on the other, and has no application to any portion of the personalty which has been made the subject of a pecuniary or specific bequest; *Mason's Estate*, 1 Parson's Eq. 129; *Hoff's Appeal*, 12 Harris, 200; *Mallan v. Griffith*, 3 Paige, 402; and this course will be pursued even when the land is devised to one child, and the personalty to another; *Mason's Estate*.]

When assets are marshalled by a court of equity, for the payment of debts, they take the following order: 1. The general personal estate, viz. the personal estate not specifically bequeathed; 2. Real estate specially and particularly devised to be sold for the purpose of paying debts; 3. Real estate descended, whether owned by the testator at the making of the will, or acquired afterwards; 4. Real estate specifically devised, and charged generally with the payment of debts: this is the general course, and every departure from it may be regarded as an exception to a general rule; *Livingston v. Newkirk*, 3 Johnson's Chancery, 312, 319; *Hays et al. v. Jackson et al.*, 6 Massachusetts, 149, 151; *McCampbell v. McCampbell*, 5 Monroe, 92, 102; *The Commonwealth v. Shelby*, 13 Sergeant & Rawle, 348, 355; *Case of Walker's Estate*, 3 Rawle, 229, 239. When debts remain, after the personal estate and the descended real estate are exhausted, they are shared in rateable proportions by all the devisees, according to

the *quantum* and value of their respective interest; *Livingston v. Livingston*, 3 Johnson's Chancery, 148, 158, 159. Lands descended will be marshalled in favor, or for the relief, of specific legatees; *Livingston v. Livingston*, Ib. 148, 153; but the priority between specific devisees and specific legatees does not appear to be satisfactorily settled either here or in England. In *Livingston v. Livingston*, Chancellor Kent said that equity would not, in favor of specific legatees, interfere with lands devised unless they were devised subject to the payment of debts. "The personal property," said another chancellor in *Rogers v. Rogers*, "is the primary fund for the payment of the debts of the testator; and, as a general principle, must be exhausted before the lands can be resorted to for that purpose. . . . Where there is a specific lien on the land devised, as in the case of a mortgage, or where the land is devised on condition of the payment of debts, or the debts are directed to be paid out of the estate devised, or where it appears from the will that it was obviously the intention of the testator that the legacy should be received entire, and the debts paid out of other funds, the court will marshal the property in such manner as to carry that intention into effect. . . . If the testator specifically bequeaths his chattels to one person, and devises his real estate to another, without any direction as to which property shall be appropriated to satisfy an existing judgment against him, the personal property must be first applied to that object;" *Rogers v. Rogers*, 1 Paige, 188, 190. See, also, *Miller v. Harwell and Johnson*, 3 Murphy, 195; and *Cryder's Appeal*,

1 Jones, 72. In Maryland, in *Chase v. Lockerman*, 11 Gill & Johnson, 186, 204, however, it was determined that devisees and specific legatees should contribute rateably in respect to debts by specialty, though devisees should not contribute to legatees in the case of simple contract debts. It has also been held that a devisee of land subject to a mortgage, is entitled to have the residuary personal estate, but not specific or ascertained pecuniary legacies, applied in ease of the land; *Ruston et al. v. Ruston*, 2 Yeates, 54.

[And the better opinion would seem to be, that specific legacies are entitled to contribution from devises for debts which are a lien on the land in their own nature, or have been charged upon it by the will; *Hallowell's Estate*, 11 Harris, 223; *Shreve v. Shreve*, 2 Stockton Chancery, 385: an opposite opinion expressed in *Elliott v. Carter*, 9 Grattan, 545, 550, that contribution cannot be claimed, unless the charge has been imposed by the testator, being apparently founded upon an erroneous interpretation of the language held by Lord Cottenham in *Mirehouse v. Scaife*, 2 Mylne & Craig, 695.]

In South Carolina, some deviations from the English rules have been created by the operation of local statutes. The general personalty is still the primary fund, in exoneration of the land, if no other direction be given in the will; *Stuart v. Executor of*

Carson, 1 Dessausure, 500, 513; *Haleyburton v. Kershaw and others*, 3 Id. 105, 115; *Hall v. Hall*, 2 M'Cord's Chancery, 269, 302; but a particular property or fund, real or personal, appropriated or pointed out by the will, for the payment of debts, will be liable before any other part of the estate; *Dunlap et al. v. Dunlap et al.*, 4 Id. 305, 329; *Pell et ux. et al. v. Ball et al.*, 1 Spears' Equity, 519; *Pinckney v. Pinckney*, 2 Richardson's Eq. 219, 235, 244; *Ford v. Gaithur*, Id. 270, 272. The general rule established in South Carolina, is, that assets are to be administered in the following order: first, real or personal estate devised for the payment of debts, or in any manner directed to be so applied; secondly, personal estate, not specifically bequeathed; and a bequest of the testator's whole personal estate, or of the residue after specific legacies out of it, is in that state to be regarded as specific, for this purpose, though a bequest of the residue, merely, or of the residue, "after payment of debts," would leave it liable to debts in exoneration of lands descended; thirdly, descended real estate; fourthly, personal estate specifically bequeathed; and lastly, real estate devised; *Warley v. Warley*, 1 Bailey's Equity, 398, 409; *Pell et ux. et al. v. Ball et al.*, 1 Spears' Equity, 519; *Leurens v. M'Grath*, 1 Richardson's Eq. 296, 300; *Pinckney v. Pinckney*; *Ford v. Gaithur*.

EQUITABLE MORTGAGE.

*RUSSEL v. RUSSEL.¹

[*541]

EASTER TERM, 1783.

REPORTED 1 BRO. C. C. 269.²

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE-DEEDS.]—*Pledge of a lease carried into effect, against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance, and certificate allowed to be read.*

A LEASE having been pledged by a person (who afterwards became a bankrupt,) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. *Lloyd*, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. *Kenyon*, for the defendants, the assignees, insisted that the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds.³

Lord LOUGHBOROUGH, Lord Commissioner.—In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.

ASHHURST, Lord Commissioner.—Where the contract is for a sale, and it is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose as to reading the bankrupt's evidence, *he having had his allowance and certificate, but the Court suffered it to be read, [*542] thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial, the jury found it was deposited as a security.⁴

¹ *Hales v. Vanderchem*, 2 Vern. 617, where it is held that the deposit in that case for the performance of a written agreement, though there was no writing declaring it to be a security, is not within the statute.

² Reg. Lib. 1782, A., fol. 441.

³ 29 Car. 2, c. 3, s. 4.

⁴ The Reporter has been informed that this cause came on afterwards, (though he has

By the 4th section of 29 Car. 2, c. 3, commonly called the Statute of Frauds and Perjuries, it is enacted, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Notwithstanding this statute, it was held first by the Lords Commissioners, and afterwards by Lord Thurlow, in the case of *Russel v. Russel*, that a mere deposit of title-deeds by a debtor for the purpose of securing a sum of money, gave his creditor, in whose hands they were placed, an *interest in the land* to which they related, so as to enable him to file a bill for a sale.

"I remember," says Lord Eldon, "previously to *Russel v. Russel*, it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; since, resting altogether upon parol, it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards, from favor to that creditor, to say, they were deposited with him for the purpose of securing his debt; and so all the perjury that the statute meant to avoid is introduced, and the rule changed. But Lord Thurlow was of opinion, and that is not now to be disturbed, that *the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact that entitled the Court to give an interest:*" *Ex parte Coming*, 9 Ves. 115. On many other occasions, *Russel v. Russel* has been strongly commented on, and disapproved [*543] of by *Lord Eldon, as in effect repealing part of the Statute of Frauds. It has, however, been constantly acted upon and recognized as a binding authority. See *Ex parte Wetherell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Ex parte Mountford*, 14 Ves. 606; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Hooper*, 1 Mer. 9; *Lacon v. Allen*, 3 Drew. 579, 582.

A deposit of a copy of court roll will create a valid equitable mortgage: *Ex parte Warner, re Cooke*, 1 Rose, 286; *Winter v. Lord Anson*, 3 Russ. 493; *Whitbread v. Jordan*, 1 Y. & C. Exch. Ca. 303; *Tylee v. Webb*, 6 Beav. 552; *Pryce v. Bury*, 2 Drew. 11. So likewise will a deposit of certificates of shares in a public company; (*Ex parte Moss*, 3 De G. & Sm. 599; sed vide *Ex parte Boulton, re Sketchley*, 3 Jur. N. S. 425;) or of a policy of insurance; (*Ferris v. Mullins*, 2 Sm. & Giff. 378.)

Notice, however, should be given to the company, in order to take such property out of the order and disposition of the depositor should he become

not been able to ascertain the date,) before Lord Thurlow, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of *Featherstone v. Fenwick*, May, 1784, and *Harford v. Carpenter*, 17th and 18th of April, 1785, where Lord Thurlow held, that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. Although there was no speceial agreement to assign, the deposit affords a presumption that such was the intent.

bankrupt or insolvent: *Ex parte Boulton, re Sketchley*, 3 Jur. N. S., Ch. 425. But a deposit of a land order of the New Zealand Company, by way of mortgage, was held to be good, without notice having been given to the company of the deposit: *Ex parte Barnett*, 1 De G. 194.

Previously to the decision of *Russel v. Russel*, many cases occurred in which persons having title-deeds in their hands had a right to say they had an interest in the deeds, but not in the estate, except collaterally; if, for instance, the owner could not part with the estate without the deeds, he should not have them without paying the debt, the possession of the deeds giving no direct interest in the estate, but an interest arising out of the power of embarrassing the proprietor in the sale: *Ex parte Whitbread*, 19 Ves. 210; *Ex parte Kensington*, 2 V. & B. 83.

The effect of a mere deposit of title-deeds to secure a sum of money, has been thus stated by Sir R. T. Kindersley, V. C. "By the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." *Pryce v. Bury*, 2 Drew. 42.

But the terms of an agreement upon the deposit of the deeds, may show the intention of the parties to have been different. Thus, in *Sporle v. Whayman*, (20 Beav. 607,) title-deeds were deposited by the defendant with the plaintiff as an indemnity against contingent payments to which he might become liable as security upon a joint and several promissory note, but there was *no agreement to execute a formal mortgage*. Before the plaintiff had made any payment, he filed a bill to have a formal mortgage executed. It was held, however, *by Sir J. Romilly, M. R., that he was not entitled thereto, but only to a memorandum, signed by the defendant, specifying the terms of the deposit. "The plaintiff," said his Honor, "wants to preserve evidence of the terms of the deposit; I think he is entitled to have it in writing, in order to make it effectual, if ever he should be called upon to pay the promissory note. His right is clear; for suppose, after the lapse of four or five years, the plaintiff should be called on to pay any part of the debt, if the defendant were dead, the terms of the agreement might then be contested. This Court daily sees the great inconvenience which arises from depositing deeds without clear written evidence of what they are to secure. Thinking that the plaintiff is entitled to have evidence in writing, I have then specifically to perform the agreement; and I am of opinion that the plaintiff is entitled to receive a memorandum, signed by the defendant, specifying the terms on which the title-deeds were deposited. I shall direct him to sign such memorandum, and the terms of it must be settled in chambers if the parties disagree."

It may here be remarked, that the recent case of *Chapman v. Chapman*, (13 Beav. 308,) seems to be adverse to the dictum of Lord Eldon in *Ex parte Coming*, (see ante, p. 542,) as to the effect of the mere adverse possession of deeds to give an interest in land. In *Chapman v. Chapman*, a bill filed in 1846, alleged a loan by the plaintiff to the testator in the year 1827, upon his bond and a deposit of the title-deeds of a freehold estate. The testator died

in 1831, and interest on the debt had been regularly paid by his executors until October, 1843. No evidence was given of the circumstances under which the deeds had come into the possession of the plaintiff, and there was no admission of an equitable deposit by the persons entitled to the estate. It was held by Lord Langdale, M. R., that what had taken place neither constituted a valid equitable mortgage, nor a sufficient ground for an inquiry before the Master. "The only evidence," said his Lordship, "is this:—the title-deeds are produced from the present possession of a party who is also a bond creditor, and nothing whatever is proved connecting the bond with the possession of the title-deeds. The simple statement of the case, therefore, is, that at this time, being a great many years after the alleged transaction, the title-deeds are discovered to be in, and are produced from, the possession of the bond creditor. I am of opinion that this is not sufficient to support an equitable mortgage." *Sed vide Smith v. Constant*, 4 De G. & Sm. 213, 216; *Burgess v. Moxon*, 2 Jur. N. S. 1059.

In *Russel v. Russel*, it was only decided that the deeds were a security for the sum advanced at the time of the deposit. The rule, however, [*545] has been enlarged, and the security been held to extend to subsequent advances, upon proof of an agreement that the deposit was originally made as a security as well for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it; (*Ex parte Langston*, 17 Ves. 227; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Nettleship, re Burkill*, 2 M. D. & De G. 124; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Baynard v. Woolley*, 20 Beav. 583, 586;) for Lord Eldon said, that this distinction appeared to him to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of the cases: *Ex parte Kensington*, 2 V. & B. 83.

Upon the same principle, where money had been advanced, previous to the abolition of the usury laws, at £6 per cent., on a promissory note, and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed to secure the principal, and interest at £5 per cent., but no mortgage was executed, it was held by the Lords Justices, (overruling the decision of Sir W. Page Wood, V. C.; reported Kay. 423,) that the parol agreement was sufficient to change the illegal into a legal contract, and that a return and fresh deposit of the deeds was not necessary to take the second contract out of the Statute of Frauds. "The deeds," said Lord Justice Turner, "being in the hands of the plaintiff, and there being a parol agreement to give him a legal mortgage, I think the case falls within the principle of *Ex parte Kensington*, (2 V. & B. 79; 2 Rose, 138,) and that the plaintiff is entitled to a decree." *James v. Rice*, 5 De G. Mac. & G. 461.

Where an equitable mortgage by deposit of title-deeds has been made,

accompanied by an instrument which by mistake has been drawn up in such a manner as to be illegal, as, for instance, void for usury when the laws against usury were in force, the Court, on being satisfied of the error, will reform the instrument so that effect may be given to the equitable deposit: *Hodgkinson v. Wyatt*, 9 Beav. 566.

In *Ashton v. Dalton*, 2 Coll. 565, a debtor had deposited his title-deeds with his creditor until such time as his account should not exceed £100, at which time they were to be restored to him. The debtor died indebted to the creditor in £274. It was held by Sir J. *L. Knight Bruce, V. C., [*546] that the deeds so deposited were a security for the whole £274.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the question has arisen, whether that constitutes a good equitable mortgage. In *Brander v. Boles*, Pre. in Ch. 375, it was decided that it did not; but the reporter states that no reason was given for the decree. Lord Hardwicke was of the same opinion, in *Brissick v. Manners*, 9 Mod. 284. So, also, in *Ex parte Bulteel*, 2 Cox, 243, where A. being indebted to B. & Co., bankers, they pressed for a real security, which A. agreed to give, and sent the title-deeds to the bankers, who delivered them to an attorney, with instructions to prepare a security, but before it was executed A. became bankrupt, Lord Thurlow, C., observed, that the case did not come within the rule which had been established, that the deposit of title-deeds as a security for money should be taken as a mortgage, for that the deeds were not deposited expressly as a pledge for securing any particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security, which was to be afterwards executed; but the bankruptcy intervening, prevented that transaction being effected. So, also, in *Norris v. Wilkinson*, 12 Ves. 192, where the person who had undertaken to execute a mortgage, and had handed over the deeds for that purpose, died before it could be prepared, Sir W. Grant, M. R., held, that it was not an equitable mortgage. "In all the cases," he observed, "that have been referred to, the deeds were delivered by way of deposit. Such deposit was, indeed, held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute an immediate pledge, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which any of the parties had in contemplation: all that is alleged is, that the defendant had undertaken to execute a mortgage when a mortgage should be prepared; and it is admitted that the delivery of the deeds was to be made only a step towards its preparation. Can the accident of the death of the intended mortgagor give to such a delivery an effect which originally it was not intended to have?" And see *King v. Benson*, cited 6 Price, 467. And Lord Eldon was of the same opinion, in *Ex parte Hooper*, 1 Mer. 7, and *Ex parte Pearse and Prothero*, 1 Buck, 525. On the other hand, Lord Kenyon, in *Edge v. Worthington*, 1 Cox, 211, held, that an agreement to give a legal mortgage, with a deposit of the title-deeds for the purpose of preparing

[*547] *the legal mortgage, constituted a valid equitable mortgage. So, also, Lord Eldon, in *Ex parte Bruce*, 1 Rose, 374, where he observed that the principle of equitable mortgages was, that the deposit of the deeds was evidence of the agreement; but if they were deposited for the express purpose of preparing the security of a legal mortgage, that was stronger than an implied intention. This case has been followed by Lord Gifford, M. R., in *Hockley v. Bantock*, 1 Russ. 141; and Lord Abinger, in *Keys v. Williams*, 3 Y. & C. Exch. Ca. 62, observes, that if it were necessary to decide the specific point, he should say, that an agreement to grant a mortgage for money already advanced, and a deposit of deeds for the purpose of preparing a mortgage, is, in itself, an equitable mortgage by deposit; but in that case the deposit was evidently made as a present security, as well as with a view of preparing a future mortgage. Lord Eldon's opinions, in *Ex parte Hooper*, 1 Mer. 7, and *Ex parte Pearse and Prothero*, 1 Buck, 527, cannot be reconciled with his decision in *Ex parte Bruce*; but it will be observed, that neither the last-mentioned case, nor *Edge v. Worthington*, was cited in those cases. Upon the whole, taking into consideration that *Brander v. Boles*, and *Brisick v. Manners*, were decided before *Russel v. Russel*, and that *Edge v. Worthington*, was neither in print, nor noticed, when *Norris v. Wilkinson* was argued before Sir W. Grant, M. R., we may arrive at the conclusion, that the balance of authority is in favor of the proposition, that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid equitable mortgage. See also *James v. Rice*, 5 De G. Mac. & G. 461.

Although a mere deposit of deeds, without any express agreement either by parol or in writing, constitutes a valid equitable mortgage, yet, if the circumstances under which they are left are such as raise an inference that a deposit was not intended, the same result does not follow; as, for instance, where title-deeds were left in the counting-house of a banker, after he had refused to advance money on them, it was held that no valid equitable mortgage was created; *Lucas v. Dorrein*, 7 Taunt. 278; 1 J. B. Moore, 29.

Where there is a statement or memorandum in writing of the circumstances under which the deposit was made, parol evidence is not admissible to contradict it, (*Ex parte Coombe*, 17 Ves. 369; and see *Baynard v. Woolley*, 20 Beav. 583;) but it is admissible to extend a lien evidenced by a memorandum in writing. See *Ex parte Kensington*, 2 V. & B. 79, and *Ex parte Nettleship*, 2 M. D. & De G. 124, where Sir John Cross held, that an agreement in writing, accompanying the deposit of title-deeds, to secure a specific *sum, [*548] might be extended as a security beyond that sum by a subsequent verbal agreement.

And where the agreement, in consequence of being unstamped, is inadmissible as evidence, other parol evidence may be given, in order to establish the equitable mortgage: *Hiern v. Mill*, 13 Ves. 114.

A parol agreement to deposit title-deeds for a sum of money advanced does not, without an actual deposit, constitute a good equitable mortgage: *Ex parte Coombe, re Beavan*, 4 Madd. 249. However, in *Ex parte Farley*, 1 M. D. & De G. 683, where deeds relating to a trust estate were deposited for safe cus-

tody with a banking firm, a partner in which was one of the trustees, the firm made advances to one of the cestuis que trust, on a parol agreement for a lien on his share, and the cestui que trust promised by letter, that, as soon as a partition could be effected of the property, he would give the firm a security for the full amount of the account; and some time afterwards, the partition having taken place, he signed a memorandum, stating that he had deposited the deeds therein described as a collateral security for any advance which the firm might make on his account; but the deed of partition was not deposited. It was nevertheless held, that the firm were equitable mortgagees of the estates taken in partition, and that the security extended to past as well as future advances.

Formerly, the memorandum of deposit of deeds to secure an annuity required enrolment, under 53 Geo. 3, c. 141, and 3 Geo. 4, c. 92, (*Ex parte Miller*, 3 De G. & Sm. 553;) but those Acts, which were passed in order to prevent evasion of the usury laws, were, upon the abolition of those laws, repealed, (17 & 18 Vict. c. 90,) so that enrolment in such cases is not now necessary; but by a subsequent Act (18 & 19 Vict. c. 15, s. 12,) registration in the Common Pleas, as against purchasers, mortgagees, and creditors, is requisite.

A deposit of deeds with the wife of the depositor, to be kept by her for the creditor, was held by Lord Eldon, C., not to constitute a valid equitable mortgage: *Ex parte Coming*, 9 Ves. 115, where his Lordship observed, "No case has gone the length, though I do not see the reason, that, if the deposit is in the hands of a person who could fairly be called a third person, abstracted from both, that can be considered a deposit for the creditor, provided that is proved to be the intention. But it is very delicate when the deposit remains in the hands of the mortgagor himself; and I doubt much whether a mere memorandum, kept in his own possession, and not parted with to the man in whose favor it is expressed, would take it out of the statute. It is very nearly *the same where the deeds are put into the hands of the wife of the [*549] mortgagor, to keep them as between her husband and the creditor."

In the recent case of *Ferris v. Mullins*, (2 Sm. & Giff. 378,) the secretary of a banking company had a credit account with the bank to the extent of £3000, secured by a memorandum specifying certain securities deposited by way of equitable mortgage. On his dying indebted to the bank in £4000, there were found in his office in the banking-house the securities mentioned in the memorandum, with others tied in a bundle and endorsed and labelled as securities, together with securities kept by him for the bank. It was held by Sir John Stuart, V. C., that the bank had a good equitable mortgage on all the securities in the bundle.

Where a deposit of deeds has been made with a firm, if it is the intention of the parties that the deposit should be for the benefit of any future members of a firm, it is necessary that such intention should either be expressly stated in the memorandum made on the deposit, or be proved by parol evidence, (*Ex parte Kensington*, 2 V. & B. 79, 83;)—but dealings with the new firm may

afford sufficient evidence of a new agreement with them, so as to give them the benefit of the deposit: *Ex parte Oakes, re Worters*, 2 M. D. & De G. 234.

If there is a contest upon the question, as to whether money was advanced upon the deposit of deeds or not, the Court will decide it, even upon a claim, where there is a clear preponderance on one side; *Smith v. Constant*, 4 De G. & Sm. 213.

Another question sometimes arises, which in *Ex parte Wetherell*, (11 Ves. 398,) Lord Eldon said, had never been decided, viz. how far it is necessary to deliver all the title-deeds relating to an estate. In *Ex parte Pearce and Prothero*, 1 Buck, 525, where A. agreed with B. to execute a mortgage of certain premises for the security of a debt, and he sent, in order that B. might prepare the mortgage, all the title-deeds, except the immediate conveyance to himself, A. being also indebted to C., took that conveyance and deposited it with C. as a security for his debt, at the same time promising to send him the remainder of the title-deeds. Lord Eldon said the question was, whether these two creditors were to be considered as equitable mortgagees, by force of their respective deposits? and if they were, which of them was to have the preference? Suppose the deeds had been divided amongst twenty different creditors, would each of them have been equitable mortgagees, or could they altogether have formed one mortgagee? The case having been again argued, his Lordship was of opinion, after a great deal of consideration, that neither of them had an equitable mortgage. "[*550] "How far the assignees," he said, "can get the deeds from them, is another matter. It is enough to say, that it was not the intention of the one, that he should have a mortgage till an actual one was executed to him, and that the other was not to have an equitable mortgage till he got possession of the whole of the deeds."

But it is clear now that an equitable mortgage may be created by a deposit of *part* of the title-deeds only: thus, in *Ex parte Chippendale*, (1 Deac. 67; S. C., 2 M. & A. 299,) where, upon the petition of an equitable mortgagee for the usual order for sale, it appeared that the bankrupts had deposited one of their title-deeds (a conveyance to trustees in trust for themselves) with the petitioner, by way of equitable mortgage, leaving the other deeds in the hands of their solicitors, but not with any intent to give the latter any equitable mortgage, nor did they claim any. The Court said, this was not the case of splitting the deeds, as in *Ex parte Pearce*, where the bankrupt intended to give two securities to different creditors, and that the whole right of the bankrupts to this property was under the conveyance to themselves, under which they derived a new title, and which conveyance was actually deposited with the petitioners. The question was, whether what was done in the case was not evidence of an agreement on the part of the bankrupts to give the petitioners a mortgage on their estate; and that there was nothing there to counteract the evidence of the intention of the bankrupt to do so—an intention which was sufficiently apparent, by the deposit of the principal conveyance with the petitioners: and that the retention of the other deeds by the solicitors must be considered as for the benefit of those who might become legally or equitably interested in the property. See, also, *Whitbread v. Jordan*, 1 Y. &

C. Exch. Ca. 303 ; and *Lacon v. Allen*, 3 Drew. 579, where Sir R. T. Kindersley, V. C., held, that a deposit of a part of the title-deeds created a valid equitable mortgage. "The question," said his Honor, "is, whether it is necessary that every title-deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In such case we must judge whether the instruments deposited are material parts of the title ; and, if they are, it is not sufficient to say there are other deeds material, or even more material, if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage."

The question, however, may arise, when part of the deeds are deposited with one person and afterwards another part with another person, which of them is entitled to priority? And it seems, that when a valid equitable mortgage *has been created by the first deposit, and there has been no con- [*551] duct on the part of the person claiming in respect of it, to give a better equity to the person claiming under the second deposit, the ordinary rule, *qui prior est tempore potior est jure*, will be applicable. Thus, in *Roberts v. Croft*, (5 W. R. 773,) Roberts, a solicitor, deposited with Miss Willes, who was his client, to secure an advance of money, a series of deeds relating to property, not showing any title to it in himself, and not including two subsequent deeds by which it was conveyed to himself. He afterwards deposited those two deeds, *which recited some of the former deeds*, with Messrs. Bult, to secure an advance from them, which they made, without notice of the former transaction. Sir J. Romilly, M. R., held, that the first equitable mortgagee was entitled to priority. "Both charges," said his Honor, "being good, the first in time must have priority, unless there are some circumstances requiring it to be postponed, and this is consistent with the judgment in *Rice v. Rice*, (2 Drew. 73.) I think it quite impossible to hold that every equitable mortgage is bad, unless the deeds deposited show a good title in the depositor. If it appears that the deeds are taken bona fide as being the title-deeds of the property to be charged, and they do relate to that property, the transaction creates a good equitable mortgage ; and if I held otherwise, I should have to determine whether a good marketable title was shown, an inquiry which the Court cannot go into in such cases. I am of opinion, therefore, that the fact that the deeds showed no title in the depositor, does not disentitle Miss Willes to her equitable mortgage. Then, as to the circumstances relied on to postpone her : no fraud is alleged ; nor is there any sufficient negligence. The only fact is, that she did not inquire for the subsequent deeds. I agree that she must be treated exactly as if she had employed a solicitor. *But if she did not make that inquiry, what inquiries did Messrs. Bult make?* They had deeds reciting several prior deeds from 1768 to 1826. Neither Messrs. Bult nor Miss Willes asked if they had got *all* the deeds relating to the property ; there is, therefore, no ground for postponing Miss Willes on account of negligence ; and being first in point of time, her charge must have priority." See *Jones v. Williams*, 5 W. R. 540.

A deposit of deeds, relating to part of an estate, with a representation that they relate to the whole, will not create an equitable mortgage over the whole

of the property, but merely over that part actually comprised in the deeds so deposited, (*Jones v. Williams*, 5 W. R. 775;) but the depositor might be compelled to make his representation good. "If a deposit *of the [*552] deeds of Blackacre is made, with an assurance that they relate to Whiteacre, that will not create a charge on Whiteacre as against a third party with whom the deeds of Whiteacre may be deposited, although the depositor himself might be compelled to make his representation good." Per Sir John Romilly, M. R., in *Roberts v. Croft*, 5 W. R. 774.

As against whom a Deposit of Title-Deeds is good.—A partial owner, as tenant for life, can only affect his own interest by a deposit of the title-deeds: *Williams v. Medlicot*, 6 Price, 495; *Turner v. Letts*, 20 Beav. 185.

Where a deposit of deeds relating to copyholds, was made to secure a sum of money advanced to one of two tenants in common in tail, with cross remainders between them, who, at the same time, signed a memorandum stating this and also "that he engaged to make a surrender of *his* interest when required." And the other tenant in common signed a memorandum as follows: "I join in the deposit." It was held by Sir R. T. Kindersley, V. C., that the debt was only a charge upon the moiety belonging to the one to whom the money was advanced, although by the death of the other he had become entitled to the whole property: *Pryce v. Bury*, 2 Drew. 11.

A delivery over of the title-deeds by a legal mortgagee, or by a depositary, to a third person, will operate in equity as a transfer of the mortgage: but the original depositor will be entitled to the deeds, upon payment of the sum to secure which they were originally deposited, although a larger sum may be due to the sub-depositary: *Wallwyn v. Assignees of Shepherd*, 4 Ves. 119; *Ex parte Smith*, 2 Deac. & C. 271; 1 V. & B. 518. In *Ex parte Truffnell, re Watts*, (4 Deac. & C. 29; 1 M. & A. 620,) where a bankrupt, having a mortgage term, deposited the mortgage-deed with a person, by way of equitable mortgage, and afterwards purchased the equity of redemption, it was held, that the assignees had a right to a re-delivery of the mortgage-deed, on satisfying the lien of the equitable mortgagee; if they did not do so, the whole of the bankrupt's interest in the property was to be sold, and the assignees were to join in the conveyance to the purchaser.

A deposit of deeds is good as against the Crown, if made before the depositor became a debtor to the Crown, by record or specialty: *Casberd v. Ward*, 6 Price, 411; S. C., Dan. 239.

So also, a deposit, as in the principal case, is valid as against the creditors of a bankrupt, unless it was made so near the bankruptcy in point of time, that, not being given under pressure, it may be held a fraudulent preference; in [*553] which case the depositary will, upon a petition, be ordered to *deliver up the deeds: *Ex parte Ainsworth, re Goren*, 3 M. & A. 457.

It may be considered now as finally decided, notwithstanding the stat. 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor, that an equitable mortgagee, by deposit of title-deeds, retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired

the legal seisin and possession of the land under an elegit, without notice of the equitable mortgage: *Whitworth v. Gaugain*, 3 Hare, 416, affirmed by Lord Lyndhurst, C., 1 Ph. 728; *Abbott v. Stratton*, 9 Ir. Eq. Rep. 233; *Anderson v. Kemshead*, 16 Beav. 329, 344; *Battsey v. Homan*, 2 Ir. Ch. Rep. 232.

An equitable mortgagee, by deposit of title-deeds, will be entitled to priority over a subsequent legal mortgagee, who advanced his money with notice of the deposit. See *Birch v. Ellames*, 2 Anst. 427, and *Hiern v. Mill*, 13 Ves. 114, where it was decided, that notice will be imputed to a subsequent purchaser or mortgagee, if he knew that the title-deeds had been put by the owner into the possession of another: *Dryden v. Frost*, 3 My. & Cr. 670; and see *Jones v. Williams*, 5 W. R. 540.

With reference to the question when notice will be imputed to a legal mortgagee, so as to postpone him to a prior equitable mortgagee having the title-deeds, the following summary of the law has been laid down by Sir George Turner, V. C.: "That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud, or gross and wilful negligence on his part; that the Court will not impute fraud or gross or wilful negligence to the mortgagee, if he has bona fide inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it. When this Court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so, except fraud or gross and wilful negligence, which in the eye of this Court amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the Court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry, from a suspicion that his title would be affected if it was made, and is therefore bound to impute to him *the knowledge which the inquiry, if made, would have imparted. But I think if a bona fide in- [*554] quiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it:" *Hewitt v. Loosemore*, 9 Hare, 458; and see notes to *Le Neve v. Le Neve*, L. Cas. Eq. vol. ii.

Where, however, the solicitor of the depositor has the deeds as equitable mortgagee, a subsequent purchaser having notice merely of the fact that the deeds are in the possession of the solicitor, will not be considered to have notice of the equitable mortgage, because it is the usual course of affairs that a solicitor should have his client's deeds. A solicitor, therefore, upon his becoming equitable mortgagee, should in order to affect third parties give express notice to them: see *Bozon v. Williams*, 3 Y. & J. 150.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee, by reason of his laches in not getting back the deeds. See *Waldron v. Sloper*, 1 Drew. 193; there Sloper in 1834, made an

equitable mortgage by deposit of title-deeds to Matthews. In January, 1840, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable a purchase to be completed, and promising to return them forthwith. He did not return them, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, Matthews deposited the deeds, by way of mortgage, with Pinckney. It was held by Sir R. T. Kindersley, V. C., that Pinckney was entitled to priority over the plaintiff. "It is an elementary principle," said his Honor, "that a party coming into equity in such a case, is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own. If, here, ordinary diligence had been used by the plaintiff, if, instead of resting satisfied with the excuses of Matthews, he had insisted on the deed being returned, not in one or two months, but even in nine or twelve months, even then, in the events that have happened, Matthews could not have committed the fraud. But Matthews having committed the fraud in 1843, in consequence of the neglect of the plaintiff from then to December, 1846, Pinckney was induced to go on making advances to Matthews on the faith of his possession of the deed. If [*555] ever there was a case in which, as between two innocent parties, that *one must suffer who has permitted the fraud to be committed, it is this case; and I am of opinion that the plaintiff, who by his great neglect put it in the power of Matthews to commit the fraud, has no right to come and ask equity to interfere."

But an equitable mortgagee will not be entitled to priority if the purchaser or legal mortgagee had no notice; for, the equities being equal, the law must prevail: *Plumb v. Fluit*, 2 Anst. 432.

An equitable mortgagee, who advanced his money bona fide, may protect his equitable estate and gain priority, by obtaining the legal estate from his debtor, even in contemplation of his bankruptcy. "So much," observes Lord Eldon, "is the equitable title from the possession of the deeds recognized, even at law, that if a man, having made the deposit previously, makes a title accordingly only two minutes before he absconds, it is a legal title, and cannot be impeached; for, though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title being only effect given to a title created not in contemplation of bankruptcy, and, except in form, complete by the deposit."—Per Lord Eldon, in *Hiern v. Mill*, 13 Ves. 122; see also *Baynard v. Woolley*, 20 Beav. 583.

An equitable mortgagee by deposit of title-deeds, is entitled to preference over the lien of a vendor who conveyed the estate without receiving his purchase-money when the receipt for it is endorsed on the conveyance, which is with the other title-deeds, delivered to the purchaser; because the equity of the mortgagee, being better than that of the vendor, who by his negligence enabled the purchaser to deal with the estate, ought to prevail over mere

priority in point of time. See *Rice v. Rice*, 2 Drew. 73, and the authorities cited in Vice-Chancellor Kindersley's elaborate judgment. See ante, p. 268.

Where a trustee deposits title-deeds in breach of trust, it is immaterial whether the depositary has notice of the trust or not; because he takes only an equitable interest, which must yield to the prior equity of the cestui que trust: *Manningford v. Toleman*, 1 Coll. 670.

An equitable mortgagee being a purchaser for valuable consideration pro tanto, his charge will, under the 27 Eliz. c. 4, be effectual against a prior voluntary settlement: *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Lister v. Turner*, 5 Hare, 281.

Privileges and Remedies of Equitable Mortgagee.—A mere depositary of a lease cannot be compelled to take a legal assignment so as to enable the lessor to sue him at law on the covenants in the lease, nor is he liable to them until he has made himself legal assignee, (*Moore v. Choat*, 8 Sim. 508, [*556] *and cases there cited; and *Robinson v. Rosher*, 1 Y. & C. C. C. 7; *Moore v. Greg*, 2 De G. & Sm. 304; 2 Ph. 717, overruling *Lucas v. Comerford*, 1 Ves. jun. 235; and *Flight v. Bentley*, 7 Sim. 149;)—nor will the case be altered by his having entered into possession of the premises and paid the rent: see *Moore v. Greg*, 2 De G. & Sm. 304; 2 Ph. 717, in which case it was argued, upon appeal before Lord Cottenham, C., that, as the depositary had been in possession, and had paid rent due from the party from whom he had taken the deposit, he was liable to the covenants, and was bound to take an assignment; but his Lordship held, that the depositary was not liable to the covenants entered into by the lessee. "One thing," he said, "is certain, that if this Court were to administer such relief, it would effectually prevent anybody from ever hereafter taking a deposit of a lease as a security for a sum of money; for no man in his senses would take a deposit of a lease if he were thereby to render himself liable to the covenants of the lease. . . . A lessee is liable to distress from his landlord, and, the goods being distrained, some other person, from interested motives or motives of friendship, comes in and pays the demand of the landlord, taking no assignment, nor any security beyond what he had before. That, of course, cannot make him liable to any of the covenants in the lease. He pays the money for or on behalf of the party who owed it. Well, then, does his being in possession make him liable? If that were so, there would be an end of the distinction between an assignment of a lease and an underlease. Taking an underlease does not render you liable to all the covenants in the original lease, but taking an assignment does; which shows that the effect of possession depends upon the title under which it is taken, and that mere possession not taken under a title can go for nothing. There are three things which are alleged as constituting the liability: the being the depositary, the having paid the rent, and the having been in possession. Now, none of these things, taken separately, will make the party liable upon the covenants of the lease; and, if none of them separately will, it is very difficult by reasoning to show why they should jointly have that effect." See also *Walters v. The Northern Coal Mining Company*, 5 De G. Mac. & G. 629; *Cox v. Bishop*, 26 L. J. N. S., Ch. 389; 3 Jur. N. S. 499.

A proviso making void a lease upon an assignment does not apply to a mere deposit of it: *Ex parte Cocks*, 2 Deac. 14; *Ex parte Sherman*, Buck. 462; *Ex parte Baglehole*, 1 Rose, 432.

An equitable mortgagee by deposit of a lease relating to lands in Ireland, [*557] where the lessee has been evicted for nonpayment of *rent under the Irish Ejectment Acts, may file a bill for redemption against the landlord: *Geraghty v. Malone*, 3 D. & War. 239; 1 H. L. Cas. 81.

An equitable mortgage, by deposit of title-deeds, is not within Lord Loughborough's general order in bankruptcy of the 8th of March, 1794, (4 Bro. C. C. 548;) so that the depositary must petition for a sale, and, if his claim rests upon a mere deposit of the deeds, he must pay the costs, (*Mountford v. Scott*, 1 Turn. 274; *Ex parte Horne*, 1 Madd. 622; 2 Madd. 281; *Ex parte Anderson*, 3 De G. & Sm. 600;) but, where there is a memorandum in writing, he will be entitled to his costs out of the estate: *Ex parte Brightens*, 1 Swanst. 3; S. C., Buck, 149; *Ex parte Trew*, 3 Madd. 372. As to what is a sufficient memorandum, see *Ex parte Robinson*, 1 Deac. & C. 119; *Ex parte Thorpe*, 3 M. & A. 441; *Ex parte Reynolds*, 4 Deac. & C. 278; 2 M. & A. 104; *Ex parte Emmerton*, 3 Deac. & C. 654; *Ex parte Reid*, 1 M. & M'Arth. 114; *Ex parte Pigeon*, 2 Deac. & C. 118. It must, here, however, be mentioned, that in *Ex parte Moss*, (3 De G. & Sm. 599,) where shares in a public company had been deposited with a bank, to secure money advanced for their purchase, without a written memorandum, it was held by Sir J. L. Knight Bruce, V. C., upon evidence being given, that it was not the custom to have a memorandum in such cases, that the mortgagees were entitled to their costs. See also *Ex parte Sheppard*, 2 Mont. D. & D. 431. If the equity of redemption has been mortgaged by the bankrupt, a bill must be filed: *Ex parte Topham*, 1 Madd. 38.

In bankruptcy, an equitable mortgagee is entitled to the rents from the time only of the order for sale, which is considered equivalent to the appointment of a receiver: *Ex parte Bignold*, 2 M. & A. 16; *Ex parte Carlon*, 3 M. & A. 328; 2 Deac. 333; *Ex parte Thorpe*, 3 Deac. 85; 3 M. & A. 441. Notice to the tenants to pay rent to the mortgagee does not alter the rule: *Ex parte Burrell*, 3 M. & A. 439; *Ex parte Scott*, 3 M. & A. 592.

If the equitable mortgagor is not bankrupt, the depositary of the deeds may file a bill for sale or foreclosure, and an absolute conveyance, (*Parker v. Housefield*, 2 My. & K. 419; and Seton on Decrees, 212, 2d ed., and the cases there cited; and see *Pryce v. Bury*, 2 Drew. 11; *Malone v. Geraghty*, 3 D. & W. 246;) and six months will be allowed for redemption: *Parker v. Housefield*, 2 My. & K. 419; *Meller v. Woods*, 1 Kee. 16, overruling *Pain v. Smith*, 2 My. & K. 417.

A decree for foreclosure against an infant, notwithstanding it is enacted that the parol shall not demur, (11 Geo. 4, & 1 Will. 4, c. 47, ss. 10 and 11,) must give him a day to show cause against the decree after he attains twenty-one, [*558] (*Price v. Carver*, 3 My. & Cr. 157; *Scholfield v. Heafield*, 7 Sim. 669;) but a decree for sale against an infant will be immediate if it appears that such sale will be beneficial, and no day will be given him: *Red-*

shaw v. Newbold, 12 Jur. 833; *Scholfeld v. Heafield*, 7 Sim. 669; and see Seton on Decrees, 340, 2d ed.

On making an order of foreclosure absolute, Sir J. Stuart, V. C., refused to add a declaration under the Trustee Act, 1850, that the mortgagor being out of the jurisdiction is a trustee, in order to found upon it a subsequent application for a vesting order, his Honor observing, that "any such order, if made, must be made on a separate application:" *Smith v. Boucher*, 1 Sm. & G. 72.

An equitable mortgagee may obtain a receiver, (*Curling v. Lord Leycester*, 19 Ves. 633; *Shakel v. Duke of Marlborough*, 4 Madd. 463; *Anderson v. Kemshedd*, 16 Beav. 329.)

Although the deposit of deeds has been merely for the purpose of securing a simple contract debt, the debt will bear interest from the date of the deposit and by reason of it, though there be no express contract as to interest: see *Carey v. Doayne*, 5 Ir. Ch. Rep. 104, and the comments there on *Ex parte Haigh*, 11 Ves. 403.

Where the goodwill of a business, carried on upon property included in an equitable mortgage, is sold, the equitable mortgagee will be entitled to the proceeds, (*Chissum v. Dewes*, 5 Russ. 29;) and fixtures, although they are not mentioned in the memorandum, upon the deposit of a lease, will be considered as part of the security, (*Ex parte Tagart*, 1 De G. 531; *Ex parte Cowell*, 12 Jur. 411; 17 L. J., Bank. 16;) and will not be considered, upon the bankruptcy of the depositor, as being in his order and disposition within the 125th section of the Bankrupt Law Consolidation Act, 1849, but will belong to the mortgagee: *Ex parte Barclay*, 5 De G. Mac. & G. 403; and see *Mather v. Fraser*, 2 Jur. N. S. 900; *Waterfall v. Penistone*, 3 Jur. N. S. 14.

As to the proper form of a bill by an equitable mortgagee, being also a specialty creditor, seeking to charge the real assets of a testator generally, as well as to enforce his security, see *Blair v. Ormond*, 1 De G. & Sm. 428; and see *Hanman v. Riley*, 9 Hare, App. 40; and *Skey v. Bennett*, 2 Y. & C. C. C. 405.

The principle, that a deposit of title deeds, upon a loan or advance of money, creates an equitable mortgage, has been recognized and acted upon in New York, in the case of *Rockwell v. Hobby*, 2 Sandford, Ch. 9, 12. "In the absence of all other proof," said the Assistant Vice-Chancellor, "the evidence of an advance of money, and the finding of title deeds of the borrower in the possession of the lender, is held to establish an equitable mort-

gage. In the case before me, the deed went into the possession of the testator for some purpose. None is specifically provided; but there is an advance of money proved, an advance which went to discharge a mortgage, given in truth for a part of the purchase-money of the land described in that deed. The only inference is, that the deed was deposited as security for the advance." In South Carolina, also, the principle appears to be ad-

mitted by Harper, C., in *Welsh v. Usher and others*, 2 Hill's Chancery, 166, 170.

In Mississippi, the doctrine has been treated as a subsisting part of the equity jurisprudence of the State, subject, however, to the same strict limitations, which are imposed upon it in England. In a case in that State, F. had purchased land from B., and received a title bond, giving his note for the consideration, with S. as his indorser, and depositing the title bond with S. for his indemnity. F.'s administrator, W., discharged the debt to B., and had the title conveyed, and subsequently claimed to be substituted to the equity of S., in regard to the title bond, on the ground that he had paid the debt for which S. was liable as indorser. "It would be difficult," said Sharkey, C. J., in delivering the opinion of the High Court of Errors and Appeals, "to sustain such a lien as that claimed, either on the law of the case, or the proof. A deposit of *all* the title deeds, as a security for a debt created *at the time* the deposit is made, is generally recognized as constituting an equitable mortgage. Such equitable liens have met with very decided opposition in England, though they have been generally sustained, but it is admitted on all hands that they should not be extended beyond their present limit. Such a mortgage is in direct opposition to the Statute of Frauds, in regard to which we have said that we will create no exceptions not found in the statute. Lord Eldon said, that in departing from the rule of the statute there was no rule to go by; and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing.

A transfer of these equitable mortgages may be made, but it must be done in the way they are first created, by a deposit of the deeds as a security. See 3 Powell on Mortgages, 1050-1061. It is not necessary that we should hold such mortgages to be invalid in every case. The record does not furnish evidence that S. delivered the title bond to W., to be held as a security. If he did so, W. no doubt delivered it to B., the original vendor. He thereby parted with the deposit which constituted the mortgage, and did he not thereby part with the lien? No case has been cited in which such an equitable mortgage has been preserved to this extent. The equitable mortgage arises by the single act of deposit, and that act must be unequivocal. It differs very materially from a legal mortgage, which is transferred by the transfer of the debt, because it is an express lien, clearly and precisely defined by the written contract of the parties. It differs, also, from the lien of a vendor who gives a title bond." *Williams v. Stratton*, 10 Smedes & Marshall, 418, 426.

In Kentucky, the principle has been doubted, if not rejected, although the point was not actually decided. "Upon the strength of the doctrine established by English adjudications," said the court, in *Vanmeter v. McFadden et al.*, 8 B. Monroe, 435, 437, "that a deposit of title papers, creates an equitable mortgage on real estate in favor of the person to whom the deposit is made, it is contended that a lien arises in this case. This doctrine of implied lien, founded on a deposit of title deeds to an estate, made by a debtor to a creditor, as security for an antecedent debt, or upon a loan of money, although firmly es-

tablished in England, has, as remarked by Judge Story, in his Commentaries on Equity Jurisprudence, (vol. 2, section 1020,) of late years been received, even there, with considerable hesitation and disapprobation, and a disposition has been strongly evinced not to enlarge its operation.

"We are strongly inclined to the opinion, that the mere deposit of title deeds should not be regarded, in this State, as constituting any lien upon real estate. If permitted to have this effect, an interest in landed property is created by the contract of the parties, not reduced to writing, in direct violation of the Statute of Frauds. The doctrine, no doubt, had its origin in England in the fact, that the possession of title deeds was necessary to the assertion of right to real estate; and the debtor having made a deposit of his evidences of title with his creditor, as a security, could not regain by an action at law, the possession of them until he had paid the money, to secure which they were pledged. If he made application to a court of equity for relief, he came under the operation of the equitable rule, that he that asks equity must do equity, and, consequently, was compelled to repay the money, in consideration of which the deeds had been pledged, before he could obtain a decree for their restitution. Under our registry laws, however, the mere possession of title deeds is of no real importance to the owner of the estate; he can procure office copies and use them, without accounting for the absence of the original deeds; and the necessity which gave rise to this doctrine of implied or equitable lien having no existence here, the doctrine itself would be difficult to be maintained, either upon

the ground of principle or of public policy." And a deposit of title deeds cannot operate as a mortgage, under the recording acts of Ohio, against subsequent judgment creditors or purchasers, even with notice, whatever may be its effect, as between the original parties; *Bloom v. Noggle*, 4 Ohio, N. S. 45, 56.

In Pennsylvania, the validity of equitable mortgages is not recognized. In *Rickert and another v. Madeira*, 1 Rawle, 325, 327, it was said that an equitable mortgage, by deposit of title deeds, might be created by parol or by written agreement, as was the case there; but in *Bowers v. Oyster*, 3 Penrose and Watts, 239, it was decided that there can be no such thing as a valid and efficacious parol mortgage; and upon the authority of this case, it was determined, in *Shitz v. Deiffenbaeh*, 3 Barr, 233, that an equitable mortgage by delivery of the title deed, is not good in Pennsylvania. "Being no more than a parol mortgage," said the court, ("for it is only by parol the meaning and object of such delivery is ascertained,) it cannot now be made a question after the express decision of the point in *Bowers v. Oyster*. Whether considered as a conveyance of land, as it may ultimately prove to be, or as a lien on lands, which is its ordinary state, a parol mortgage is contrary to the spirit of our legislation in the Statute of Frauds, and acts for the recording of mortgages, and for entering up liens for public information, and to the uniform current of decisions on these subjects in Pennsylvania."

It has been held, however, in many of the courts of this country, that an agreement in writing to give a mort-

gage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien, which will have precedence of subsequent judgment creditors; *Read v. Simmons*, 2 Dessaussure, 551; *Menude v. Delaire*, Ib. 565; *Executor of Polony and Read v. Keenan and others*, 3 Id. 74; *Welsh v. Usher and others*, 2 Hill's Chancery, 167, 170; *Massey v. M'Ihwain and others*, Ib. 421, 428; *Dow et al. v. Ker et al.*, 1 Spears' Equity, 414, 417; *In the matter of Howe*, 1 Paige, 125, 130; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21; *Lake v. Dodd et al.*, 10 Id. 415, 425; See *Doe ex dem.*

Burgess v. The Bank of Cleveland, 3 M'Lean, 140; *The R. Road v. Tallman*, 15 Alabama, 472; *Abbott v. Godfrey*, 1 Michigan, 478; *Bloom v. Noggle*, 4 Ohio, N. S. 45. And in *Ogden v. Ogden*, Ib. 182, an agreement between a vendor and vendee, that a mortgage should be made to the complainant for the purchase-money, in payment of a debt due to him by the vendor, was specifically enforced by equity. In Ohio, however, unrecorded mortgages are absolutely void against judgment creditors, as well as purchasers, and cannot be rendered valid by the most express notice; see *post*, vol. 2, note to *Le Neve v. Le Neve*.

EQUITABLE WASTE.

[*559] *GARTH v. SIR JOHN HIND COTTON.

JULY, 1750.

REPORTED 1 VES. 524, 546; 1 DICK. 183.¹

EQUITABLE WASTE.]—*A.*, tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life, to preserve contingent remainders; remainder to first and other sons in tail; remainder to *B.* in fee. *A.*, before a son born, and *B.*, according to agreement, cut down timber, and divided the profits between them. *A.* afterwards had a son, who was held entitled to recover from the representative of *B.* what he had so received as his share of the money arising from the sale of the timber.

Rights, powers, and duties of trustees to preserve contingent remainders.

MR. GARTH,² tenant for ninety-nine years, if he should so long live, without impeachment of waste, excepting voluntary waste; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and every other son in tail; remainder to the defendant, Sir John Hind Cotton, in fee.

¹ S. C., 3 Atk. 751; Reg. Lib. 1752, A., fol. 240.

² The statement of the case and the arguments are taken from 1 Ves. 524.

Garth having been long married without having children, enters into an agreement with the defendant, Sir John Hind Cotton, to cut down timber on the estate, and divide the profits between them.

He has afterwards a son by another wife, who, after his father's death, when of age, and having suffered a recovery, brings this bill to oblige the defendant, Sir John Hind Cotton, to refund £1000, received by him as his share of the money arising by sale of the timber, with interest.

**For the Plaintiff.*—There is no particular precedent exactly as the case stands; therefore it must depend on general principles. The question is, whether they had a right to cut timber; and, if not, whether the plaintiff thereby is injured, which is necessary for the plaintiff to show, and that the defendant, at the time of doing it, was wilfully guilty of an injury to the plaintiff—that is, the unborn children of Garth; for, if this is a damage without an injury, the Court will not give satisfaction. [*560]

The trustees were to preserve the contingent uses of everything that was settled. To avoid a perpetuity was this method of preserving estates in families a certain time by inserting trustees; which (said to be invented by Lord Bridgman,) has been since extended by a court of equity. If trustees joined, the Court would make them liable for a breach. It was by some conveyancers doubted whether the trustees joining could bar, which came first in *Pye v. George*,¹ where Lord Harcourt said, that destroying contingent remainders was a wrong, and that he would make a precedent if there was none. That precedent was afterwards solemnly made in *Mansell v. Mansell*,² where a court of equity went further than ever, holding a purchaser to be a trustee for a contingent remainderman. Every one doing it with notice is affected with the trust; and if the estate is got into such hands as not to be followed in equity, the Court would make the trustees liable for the breach. Thus it is on inheritances of land: a tree growing on the estate is as much a part of the inheritance as a house or the land; and, as to the person interested, selling the timber, is as much to the destruction of his inheritance as selling the land. Though there is no remedy at law, the trustees might have complained in equity that they were to preserve the contingent remainders, which might be in esse perhaps in a year, and that the Court should not suffer the present tenant for life to be guilty of that permissive waste, because it is a prejudice to one who may be in esse, and was intended by the donor to have that which is in esse. Though there is no precedent for this, yet in many cases [*561] will the Court prohibit waste, though no action of waste lies.

If then, the Court would do so, as being a wrong, the trustees neglecting their duty, or not knowing it, will not alter the case so as to prevent that satisfaction consequential to an injury. [*Lord Chancellor Hardwicke.*—I know no case where the trustees might bring such bill, though I have heard it said they might; and if this is so in case of a donee, it might be so in case of a purchaser.] In case of a purchaser, it would be contrary to common jus-

¹ 2 Salk. 680; Prec. Ch. 308; 1 P. Wms. 128; 7 Bro. P. C. 221, Toml. ed.

² 2 P. Wms. 678; Ca. t. Talb. 252.

tice if the trustees might not bring such a bill; for then a man might immediately destroy the settlement he had made. Several injunctions have been granted where no action of waste could be, as in case of an intermediate estate for life: *Moo. 554*; where, it appears, he in remainder could have an injunction so long ago as the time of Richard II., for waste by the first tenant for life, as being an injury to his inheritance, taking away part of the value thereof. It is also an injury to the intermediate remainderman for life, and as it takes away the benefit of the shade; so that, on a bill by either, the Court would interpose, and not say, you may bring trover, but would prevent the injury. Had this been the case of an infant in ventre sa mere, entitled to the inheritance, undoubtedly a bill would lie, though he cannot bring an action, ejectment or trover, notwithstanding he may be vouched: *Musgrave v. Parry*, 2 Vern. 710. Then there is no reason but that a person who may come in esse should have the same equity as one who has a being of a month, if it may be so called. In *Abraham v. Bubb*, 2 Sho. 69,¹ (though a book of no authority,) is cited a case called *Lady Evelin's*, not reported in print, but in Lord Nottingham's manuscript; where it was said, that where tenant for life, remainder to the first son for life without impeachment of waste, remainder over, the first son, by leave of tenant for life, comes on the land, and sells the trees, he was enjoined in this Court by Lord Nottingham; though there could be no action at law. A bill may be brought by the patron of a living to prevent the incumbent from cutting down timber; though the interest the *patron [562] has is very little, nor any remedy in point of law, as he cannot enter, or seize the timber: but, from his remote interest in the thing in possession, the Court will relieve, because the law does not effectually, and will not say that you may go to the bishop. In *Fleming v. Fleming*, July 19, 1744, *Bishop of Carlisle's case*,² tenant for ninety-nine years, if he so long live; remainder to trustees to support contingent remainders; remainder to another for ninety-nine years, if he so long live, without impeachment of waste; remainder to his sons successively in tail male, remainders over; both tenants for ninety-nine years, thinking they had an interest together to cut down, because the second had a right to do so if in possession, agreed to sell the timber, and divide the profit, as here. On motion for injunction your Lordship granted it, holding that there was no remedy at law, and that the privilege of *without impeachment* must be considered as annexed to the estate when it comes into possession. In *Robinson v. Litton*,³ 12th December, 1744, the testator devised an estate to his eldest son and his heirs; and if he should not live to attain twenty-one, leaving no issue, devised it to his eldest daughter and the heirs of her body; remainder to his two other daughters successively in tail. The children were all infants. The son, within two years of twenty-one, petitioned to cut down timber, being for his benefit, as owner of the inheritance, though subject to that contingent interest to his sisters. Your Lordship refused it, but left him to do what he could according to law. Upon that the parties

¹ S. C., 2 Freem. 53.

² *Fleming v. Bishop of Carlisle*, cited 1 Dick. 209.

³ 3 Atk. 209.

agreed that some small timber should be cut down, and then a bill should be brought by the daughters upon their contingent interest to prevent the waste, which was done; and, though that was a remote and improbable contingency, the Court thought the felling of the timber should be stayed; not that the defendant could not do it in a point of law, for he had an estate of inheritance, and every such estate carries a right to cut timber; yet did the Court restrain him, and said, that if an estate descended to an heir-at-law where an executory devise was depending, that heir, notwithstanding *he would have the legal estate of inheritance in the meantime, till the contingency happens, shall not be suffered, for the sake of those persons who may come to be interested, to fell in the meantime. But the defendant is not tenant in tail in possession, and therefore could not do it, though no son was born at the time. It was not a remote contingency; and it was determined, in *Lewis Bowles's case*,¹ that, if a son is born, the estate shall open. If, then, there might have been that preventive remedy by injunction, there ought to be this compensating remedy, supposing the act done. But it may be said, though *fieri non debuit factum valet*; for that, by the severing the property, it vested in the defendant as tenant in fee. If severed by act of God, as in the *case of Welbeck Park*,² where timber was blown down on the Duke of Newcastle's estate, it would be so from the rule of law, which says, that a tree lying on the ground shall not be held in abeyance, but go to the first owner of the inheritance, who might maintain trover for it. But this is not so severed, for they knowingly contrive the injury. If allowed, it will be in the power and the interest of tenant for life to bargain with a remainderman, though ever so remote, by giving him something he could not be entitled to at all, which would encourage these collusive agreements.³ So, one made tenant for life on his marriage, reversion to himself in fee, being entitled to all windfalls, might immediately strip the estate. There is no acquiescence or length of time here, which might amount to waiver of right, or afford presumption of evidence in doubtful cases; but the plaintiff was not born until ten years after, not being of age till 1745, and pursued it recently. There is no difficulty on defendant, in point of evidence, from length of time; but if there was, he must have seen it could not have arisen till at a distance.

For the Defendant.—This is a new case; and, as admitted, not well founded on law, so neither is it in equity. Defendant, on application by plaintiff's father, agreed, provided reasonable satisfaction was made to him, not to take the advantage of felling the timber, which he might. *The bill, then, is not proper against him, without the representative of the father. At law no writ of prohibition or action of waste lay against tenant for life or years, as the parties must provide for that: since the Statute of Gloucester, indeed, it is otherwise. But to whom could the defendant be responsible? Not to the plaintiff, had he been born; for, in point of law, if he was a stranger, (as a remainderman in fee is, as to privity between him and

¹ 11 Co. 79; Lead. Cas. Real Prop. 19.

² Duke of Newcastle v. Vane, cited 2 P. Wms. 241.

³ Lee v. Alston, 1 Bro. C. C. 196.

tenant in tail,) he was liable only to the lessee for life or years, who was responsible only to the person having a right to bring the action of waste; and remedy was left over against the stranger, against whom the action of waste could not be brought, as held by Lord Coke. Next this is a personal tort, which dies with the party who alone was liable: then it would be extraordinary, if the representative of the party committing waste should not be liable, that the defendant, (who was never liable to the person who could bring the action, nor even to the lessee for life or years, if living, as the waste was with his consent,) should now account for that waste. It is admitted, that if blown down, or cut without concurrence of defendant, he would be entitled to the benefit of the whole: how, then, is it the act of the defendant? It is singly the act of the lessee for life. Suppose the lessee had given the defendant so much money not to take the benefit of it: he might have done it for a consideration, or for none at all; for why may not one renounce a right? And this amounts to the same. Though this Court will interpose to prevent waste, yet never where the estate has ceased in the person committing it. In *Jesus College v. Bloome*,¹ Nov. 19, 1745, the plaintiffs had made a new lease to another; and, discovering afterwards that the former lessee had cut down timber and committed waste, brought a bill against him for an account thereof. Your Lordship dismissed it; for that where a lease determined, and possession was quitted, the Court will not decree an account; though, where the lease continues, it would decree an account of waste, as incidental to that jurisdiction the Court has to prohibit and enjoin it. As soon *as severed, [*565] the property belonged to the defendant, who might have seized it, or brought an action without seizing; for the father certainly had no other property than a special interest in the trees, while they continued annexed. [*Lord Chancellor Hardwicke*.—Suppose the trustees had been vigilant, and brought a bill to stay this waste, and prayed an account of the timber so felled under this agreement; I think that would be a proper bill: and, if the Court had made a decree, there would be an injunction to stay the waste; and, incident to that, the Court may decree an account of the waste already committed: what would the Court have directed to be done with the money raised by the timber sold?] The money even by the aid of this Court, would be decreed to defendant. *Udal v. Udal*, Aleyn, 81, and several other cases, show, that the very cutting vests the property in the first owner of the inheritance. If there had been an intermediate vested remainder for life, it would make no difference; for the defendant might then have seized or brought trover, though not an action of waste; and, after the death of the intermediate tenant, might have brought *waste* for the waste in the life of that tenant. But it has never been determined, that the intermediate estate of the trustees should bar the remainderman in fee from an action of waste or take away a legal right; which it is admitted that would not do, if they were blown down. This estate in trustees took rise on political considerations, in the time of the civil wars, to prevent any act wrongfully done to put a period to the estate;

¹ 3 Atk. 262; Amb. 54.

and, being created to one particular purpose, should not be wrested to another, or take away a remedy given to the owner of the inheritance by the statute. If the remainderman in fee, by action of waste, recovers the place wasted, the remainderman coming in esse cannot recover this estate vested; as held in the *Case of Lincoln College*. This Court will indeed, under particular circumstances, at the instance of trustees, hearken to complaints by them; and has gone so far, in *Mansell v. Mansell*,¹ as to declare what its sentiments would be in case of a breach of trust where the trustees *joined. But suppose they had joined, and been parties to these articles, they would not [*566] have made the legal right of the parties in the timber, when cut, different. But they did not join, nor file such bill to stay waste: and there is no instance where the Court ever interposed on their omitting to act. If by such omission a benefit accrued to another, the Court never interposes to take it away, there being instances to the contrary: as in *Partridge v. Pawlet*, Hil. Vac., 1736,² before your Lordship, where plaintiff's wife, tenant for life without impeachment of waste, being a sickly person, was going to cut down timber, to the produce of which she would be entitled. A bill was filed on behalf of her sister to restrain her, for that the estate was subject to debts in aid of the personal, which would probably not be sufficient for that. The Court granted the injunction. But, there being no deficiency in the personal, a question arose, after the wife's death, between her husband and administrator and the sister, at whose instance the injunction was obtained upon an untrue suggestion, whether the estate should be put into the same condition as if no such injunction had been granted. The Court expressed an inclination to do so, if it could; but though it was a very hard case, and a misfortune happening by act of the Court taking away a power annexed to the tenant for life, yet, as an interest was by that means attached in a third person, the Court did not think itself empowered to take away that right. Then much less will the Court, where, by the non-opposition of the trustees, a benefit accrues to a third person. *Whitfield v. Bewit*,³ is a little defectively reported. It seems there, as if there were trustees to preserve, &c.; and, if there were, that case is a direct authority.

LORD CHANCELLOR HARDWICKE.—*Partridge v. Pawlet* is not applicable to the present case.

This is of the first impression—of great consequence and importance in point of precedent: therefore I will take time to consider of it.

¹ 2 P. Wms. 678.

² 1 Atk. 467.

³ 2 P. Wms. 240; see, also, *Bewick v. Whitfield*, 3 P. Wms. 267.

[*567] *GARTH v. SIR JOHN HIND COTTON.

AUGUST 10, 1750.

REPORTED 1 VES. 546.

LORD CHANCELLOR HARDWICKE.—Although I have taken a great deal of pains, I cannot yet form an opinion, from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a court of equity. The case is admitted to be entirely new. The strength of the arguments for the plaintiff is on the authority of *Pye v. George*¹ and *Mansell v. Mansell*,² where the Court has considered trustees to preserve contingent remainders as trustees to all other purposes, so as to be affected by breach of trust and all the consequences: and, therefore, if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when in esse. But it deserves to be considered, whether they have any trust to preserve the timber, because their legal estate is not at all for that purpose, being only an estate pour autre vie; by which there is no interest in or power over the timber, and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for an injunction to stay waste, before the contingent remainders vested; and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by amicus curiæ; as in a bill on behalf of an infant in ventre sa mere, to stay waste. Till the estate attaches in possession they have nothing to do with the timber. If, indeed, there is a forfeiture for the first tenant for life, they would have a right to the shade, &c., but nothing to do with it during the life of the tenant for life. This is no opinion, but only my doubts from the breaking in on the [*568] rules of law on the one hand, and on the other the laying down *a precedent in equity which might be dangerous. Let it, therefore, be spoke to again next term. I can find no case where the Court has preserved the timber, though cut down by wrong, for the benefit of the contingent remainders. In *Whitfield v. Bewit*,³ it was not by accident, but by wrong; and though Peere Williams has not mentioned whether there were trustees to preserve &c., I have looked into it, and find there were.

Michaelmas Term, 1750, it was argued again.

For the Plaintiff.—The bill is against the defendant only so far as he has been benefited himself by agreeing to this act, which is a detriment to the plaintiff's inheritance. The case is new in specie, but the Court will go on the general principles of law and equity. The whole merits depend on two points: *first*, whether, on application by the trustees at the time of the agreement, the Court would have restrained them both—the tenant for ninety-nine years from cutting by license of the remainderman, and the remainderman from coming upon the estate by license of the tenant; *next*, if so, whether

¹ 2 Salk. 680.² 2 P. Wms. 678.³ 2 P. Wms. 240.

satisfaction ought not to be decreed for that act, when done, which the Court would have prevented, as against conscience.

As to the *first*. To show that the Court would have done so, it is necessary to state the notion of justice established as to preserving timber, houses, mines, and other things, capable of being, in fact, severed from the inheritance, and which yet are part of it in notion of law, and considered as annexed. There are but four cases in which a court of equity interposes to preserve an inheritance entire. First, where there is no legal remedy whatever that extends so far as to answer the intent of the settlement under which all claim, and from which intent it is clear that what is doing is wrong. This holds where tenant in tail apres possibility, &c.,¹ or wife tenant in tail ex provisione viri goes to pull down houses, or commit destruction. No action of waste or of property can be brought, yet this court will enjoin: *Abraham v Bubb*, 2 Sho. 69,² and *Cooke v. Whaley*, 1 Eq. Ca. Ab. *400; because the mansion-house [*569] is settled as well as the rest; and this tenant in tail apres, &c., is but tenant for life, who could not do it, though he was so, without impeachment of waste. This is the most ancient jurisdiction of equity—in the time of Richard II., (Moor, 554,) and several precedents in Henry VIII. and Edward VI.; but since the *Case of Raby Castle*³ it is established. There was tenant, without impeachment of waste, (which, since *Lewis Bowles's case*,⁴ gives leave to commit waste,) yet would not this court suffer it, because contrary to the form of the settlement, though there was no legal remedy. On the same principle have been cases as to an avenue in a park for ornament or shelter. Secondly, where there is a temporary impediment to the remedy at law, so that the act is at the time dispunishable, equity interposes; as, where there is an intermediate tenant for life, the remainderman of inheritance cannot bring an action for waste by the first tenant for life, for the sake of the preservation of the innocent remainder for life; 2 Inst. 301. It is not so if it was a remainder for years, and it would not be destroyed by the action. But a stronger case is of an estate for life, remainder for life, without impeachment of waste, and with a power to commit waste: both agree to commit waste, and though dispunishable at law, yet this court would enjoin, on the principle that it was an injury to the inheritance, although it was a bare contingency whether it would be a prejudice to the owner of the inheritance or not; which was *Lady Evelyn's case*:⁵ so, in *Fleming v. Fleming*, though no remedy at law. The third case, where there is a remedy in equity only, is, where a person, who may be consequentially injured by the waste, from the weakness of his estate, has no remedy at all at law: as where tenant for life; remainder for life, with or without impeachment of waste; remainders over,—on the bill of remainderman for life, the Court would restrain the first tenant for life from committing waste: *Dayrell v. Champness*.⁶ If guardian of infant,

¹ After possibility of issue extinct.

² 2 Eq. Ab. 757; 2 Freem. 53; 2 Swanst. 172, n.

³ *Vane v. Lord Barnard*, Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ab. 399; 1 Salk. 161; 2 Vern. 738.

⁴ 11 Co. 79.

⁵ Cited 2 Freem. 55.

⁶ 1 Eq. Ab. 400.

tenant in tail, cuts down the whole timber, the Court will not, on application of the remainderman, *enjoin; which was *Saville v. Saville*,¹ although [*570] the infant there was very ill, and did die before he came of age: but if done in such a way as to be to the prejudice of the infant himself, on the application of the infant, the Court will judge what is for his benefit. The fourth, and most material to the present case, is, where new limitations are introduced and allowed by law and courts of justice, since the time that all the doctrine about waste was settled. Since the Statute of Gloucester, courts of law cannot adapt their remedy to a new purpose: then the Court interposes on the foundation of justice, and on the principle, that, this new sort of limitation being introduced, it must be protected in all its consequences, because the limitation itself the law allows. Executory devises and springing uses existed not before the time of King Henry VIII. Then none of the rules at law concerning waste can be applied to them; and any man, having a fee subject to be defeated on a contingency, may, in point of law, pull down houses and cut down all the timber: no legal remedy, as action of waste or trover for the timber, lies, nor a prohibition; but in equity there is a remedy. In *Robinson v. Litton*,² the inheritance being given over to the daughters on a contingency, your lordship thought the intent was, that the whole and every part of the inheritance should be preserved to wait that contingency, and that a bill may be brought for infant in ventre to stay waste, the statute of King William³ having declared him capable of taking—that is, preserved a contingent remainder to him; yet that infant has no legal remedy, nor after his birth can he bring trover. This Court then interposes, because the law does not. When the legal remedy about waste was established, no such thing was known in the law as a contingent remainder which might not be destroyed by the tenant for life and first owner of the inheritance. It was of no value at all; and then why should part be preserved?—which was the ground of the determination in *Udal v. Udal*,⁴ and 1 Rol. Ab. 119.⁵ This limitation, being for years, could not then exist at all, as there must be a freehold to support the contingent remainders; but it is now allowed, being [*571] *introduced at the time of the troubles, about 1640, by Sir Geofrey Palmer, who invented it for preservation of contingent remainders; but no legal remedy is adapted to it. The Court, then, will act on the same principles as in executory devises, which are very like this, being a limitation to arise on a contingency. Where, indeed, there are no trustees to preserve, &c., this Court would not grant an injunction to stay waste against tenant for life and first owner of the inheritance, who, by the rule of law, may, notwithstanding the contingent remainders, do what they will with the whole estate, and then may with part of it; this Court not relieving against a general rule of law. But, now such trustees are allowed and approved of, they must execute this trust according to the different remedy the constitution allows, to preserve every part of it; so that, if tenant for life levies a fine, his particular

¹ Saville's case, Mos. 224; cited Ca. t. Talb. 16.

² 10 & 11 Will. 3, c. 16.

⁴ Aleyn, 81.

³ 3 Atk. 209.

⁵ Uvedale v. Uvedale.

estate is forfeited; they shall enter, but though they do not, their right of entry shall preserve all the contingent remainders. If he fells timber, there is no remedy at law; they must apply to this Court; and it is established, that, on an executory devise, this Court will interpose. But they are more emphatically entitled to this here; for the very purpose for which they have an estate for life is to preserve the contingent estate afterwards to arise, this Court considering it as an executory trust; so that, if they had brought a bill, both would have been prevented, because both were doing an injury—the owner of the inheritance, in cutting down before it was his day, as in *Lady Evelin's case*;¹ and it would be of very extensive consequence if a court of equity should not interpose, when there is no legal remedy adequate. A right without a remedy is a solecism; this Court finds one, as in case of infant in ventre, of executory devises, and where there are temporary impediments. If, on such a bill by the trustees, the Court would not restrain, the argument must be given up. None but the trustees could apply; for, though any one may file a bill in the name of an infant in ventre, considered as having existence in many cases, it is not so here; but the trustees, who have a foundation *to go upon, as having a remainder themselves prejudiced by this [*572] act, can alone apply.

If, then, the trustees, through ignorance or neglect, did not bring such bill, the *second* consideration arises, whether satisfaction ought not to be made now. Should this Court say, they only enjoin, there is no adequate remedy, for it might be then done by surprise. Lord Barnard was not only restrained, but obliged to make satisfaction and restore, on the principle that the Court would have prohibited him, and that complete justice could not otherwise be done. Where trees are cut down, specific satisfaction cannot be decreed; it then is only by way of compensation by damages. A bill to stay waste draws after it an account of the waste committed. If the injunction is disobeyed, an attachment would issue: the terms on which the Court would suffer the contempt to be cleared would be on paying costs of the contempt, and making satisfaction as far as could be; for the commitment is only a mean, and otherwise no one would value risking the contempt. It is a maxim, that neither infant nor person unborn can suffer by laches of a trustee, or of the person who ought to act; but the doctrine contended for would put their fate in the power of these trustees. If trustees join in destroying contingent remainder, it would take effect at law, but this Court would set it up again, and, if it got into the hands of a purchaser without notice, would make tenant for life, and every one who joined, make satisfaction. If, indeed, the trees were blown down, or cut by wrong or trespass, without permission of the owner of the inheritance, the property would, ex necessitate, be the defendant's, as it cannot be in abeyance, and the severance was without default; there would be nothing of which this Court can lay hold of against his conscience. *Whitfield v. Bewit*, as in 2 P. Wms., 240, is no authority in the present case. On searching the register, it appears, indeed, that there were trustees; but the Court did not go on

¹ Cited 2 Freem. 55.

that; the objection was not taken, nor did the argument proceed on it. If no satisfaction can be obtained for this, timber may be destroyed *and
 [*573] mines opened on every estate, contrary to the intent of the makers of the settlement, and of every one entitled under it, except the first owner of the inheritance, who may destroy the whole, or work the mines barely on consent of a common farmer for life, by collusion with him, or ex vi, if he does not agree; an action for the loppings and shade could be only brought by the tenant, which it would be worth while to pay on a wooded estate. There are few estates in England which are not let for years; and the first owner of the inheritance, (although his remainder is very remote,) may, by joining with such tenant, strip the estate, for *trespass* or *waste* cannot be brought against him. This argument, ab inconvenienti, is the strongest at law as well as equity. As, therefore, the law allows these contingent limitations to be made and preserved, and most lands in the kingdom are so settled, and the intent of the parties is to preserve the timber as well as the rest, and as there is no legal remedy, this Court will find one, which will not be adequate if satisfaction is not made after the act is done. This, therefore, is not a particular case, but a very general and universal one.

For the defendant was cited *Claxton v. Claxton*, 2 Vern. 152; *Aspinwall v. Leigh*, 2 Vern. 218; and that, if the parties were disabled from severing the timber, it might be kept too long on the estate, and rest in suspense for several years, to the detriment of the public.

LORD CHANCELLOR HARDWICKE took further time to consider of it; and Sir John Hind Cotton having died pending the suit, and the cause revived against his representatives, his Lordship gave judgment, 5th February, 1753.

LORD CHANCELLOR HARDWICKE.¹—The end of the bill is, that defendant may account, and make satisfaction to the plaintiff, for all such sums of money as he hath received by a fall of timber upon the estate in question, in the year 1714, with interest.

[*574] *The case is this:—Richard Garth, Esq., being seised in fee, by will devised to Richard Bovey, father of the plaintiff, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, *to the use of trustees during the life of the said Richard Bovey, in trust to preserve contingent estates*, but, nevertheless, to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his first and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner, (all which determined soon after the testator's death,) with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine, his wife, executrix.

¹ 1 Dick. 183. This case was copied from Lord Hardwicke's written argument.

On the 18th July, 1700, the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th February, 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot, authorizing him to come to an agreement with Sir John Hind Cotton, the remainderman in fee, for a fall of timber on the estate.

On the 16th of July, 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney, on the one part, and Sir John Hind Cotton, the defendant's father, on the other part, reciting that the plaintiff's father was seised for life, (which is not true, for his estate was only for ninety-nine years, determinable on his life,) with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plaintiff's *father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down and selling part of the timber [*575] then standing and growing upon the premises.

Upon these recitals it is agreed that some person authorized by the plaintiff's father, and some person authorized by Sir John Hind Cotton, should view, and mark what timber trees were then fit to be cut down; that then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not been nor shall be paid out of the personal estate, (although it is admitted, by the answer of the original defendant, Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts;) that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of 1787*l.* 5*s.* 6*d.* then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, and applied to the same purposes as the money to arise by the timber then to be felled.

It is further agreed, that the death of the plaintiff's father without issue male, or, his having issue male, on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on; but that the *par- [*576] ties, their executors or administrators, should, notwithstanding any death or alteration, have the like share and benefit of the wood and timber to

be felled and cut down, as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death or alteration.

Then follows a clause for applying the testator's personal estate, in the first place, to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits, by his first answer, (which is not replied to,) that he received about the sum of £1000 for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, *the plaintiff was not born*, but his father was then married to Mary Pullen, his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September, 1716, she died without ever having had any issue; and sometime after, the plaintiff's father intermarried with Elizabeth Emmerson.

On the 26th of May, 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of January, 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On the 26th of May, 1745, the plaintiff attained his age of twenty-one years, and in Trinity Term following suffered a recovery of the estate to the use of himself and his heirs.

On the 20th of May, 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants, his executors, and the same relief is prayed out of his assets, and assets are admitted.

[*577] Upon this case the general question is, whether the *plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton, the father, received out of the inheritance by the fall and sale of timber, before the plaintiff came in esse, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This hath been admitted at the bar, on all sides, to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted, also, that the plaintiff can have no remedy at law, either in his own name or in the names of the trustees to preserve contingent remainders, but that his only possible remedy is in a court of equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration—to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, that the stripping of this estate of the timber was a wrongful act is clear from the nature of the limitations.

The plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.

The defendant's father had no *present* right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come in esse; and in that quality the timber part of the inheritance was vested in him, but he had no present right to take and use it. The trustees, who were *seised of the freehold, might have restrained him in this Court. [*578] by injunction, and the plaintiff might have brought an action of trespass against him for his entry and tortious act.

Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainderman, when he should come in esse; for between the tenant for years and the lessor, or the remainderman of the inheritance, there is a privity; and before the statute of quia emptores terrarum a tenure arose: and this makes a tenant for years a kind of fiduciary for the lessor, or the remainderman, who stands in his place.

As this act was wrongful, both in Mr. Garth, the plaintiff's father, and the late Sir John Hind Cotton, so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to this, the plaintiff's father is recited to have the freehold, which he had not. A color is given to the transaction, as if it were for payment of the debts of the father, to which it is admitted the estate was not liable; and it is expressly stipulated, that, even in case the plaintiff's father should die, leaving issue male, before all the timber should be felled and the money divided, the parties to these articles, (i. e. the tenant for years and the remote remainderman,) should have the same shares as if all the timber had been felled and the money divided before such death or alteration had happened.

Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust, (if I may so speak,) but both the parties bind themselves in plain [*579] *terms to injure the remainderman, even after his estate should become vested, if that event should happen before this destruction was completed.

The *next* thing which is plain and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

The next inquiry is, whether the plaintiff is entitled to any remedy in this Court upon the principles of equity.

At law, it is admitted, as I said before, that he can have none; and it must be admitted further, that, if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainderman vested; and there could have been no pretence for this Court to interpose to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore, the stress and foundation of the *plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses*, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, what is the intention and use of creating limitations to trustees for preserving contingent remainders.

Secondly, what estate such trustees take in point of law, and what actions they may maintain at common law.

[*580] **Thirdly*, what is the nature and extent of this trust in equity, and what remedy they may pursue in this Court.

Fourthly, how far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches, in breach of their trust.

First, the intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases, reported by Lord Coke, in his first volume—*Chudleigh's case*,¹ Hil., 31 Eliz., and *Archer's case*,² Mich., 39 Eliz.; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.

Let us see, then, what were the claims and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's case* was concerning the power of feoffees to uses created since the stat. 27 Hen. 8, c. 10, to destroy contingent uses by fine or feoffment before the contingent use came into being.

In order to determine this, the judges entered into very refined and specu-

¹ 1 Co. 120; Poph. 70, and 1 And. 309, where it is best reported; see also S. C., Lead. Cas. Real Prop. 200.

² 1 Co. 63.

lative reasonings, some of which (I speak it with reverence,) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over—in all those cases no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not in esse. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of disseisin or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute unless *there be a person seised to the use, and also a *cestui que use*. [*581] And, if any disseisin or disturbance of the estate should happen, the right to the use cannot be executed within the statute; therefore, lest these contingent uses should be destroyed and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the judges.

Others of the judges were of opinion that there was not only no estate left in the feoffees, but no power or right to enter, nor anything to do with the land; but that they were at first only conduit-pipes, and the estate that was in them was by the statute wholly transferred to serve the uses which were in esse, with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the judges, to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not in esse, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment or conveyance of the *cestui que use* for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came *Archer's case*, in which case this point was solemnly settled, and they were relieved from their apprehensions; for, though *Archer's case* is placed in the reports before *Chudleigh's case*, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases is stated by Mr. Pollexfen, in his argument of the case of *Hales v. Risley*, in Pollexfen, 385, from whence I have taken it.

*From this deduction you will see what were the chasms and defects [*582] to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses *ad libitum*, and here was a power in the *cestui que use* for life to destroy them.

How were these defects to be supplied and filled up? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the cestui que use in contingency, in like manner as trustees to uses ought to do before the Statute of Uses, when they were but trusts to be executed in this Court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the cestui que trusts in remainder, either vested or contingent.

Secondly. Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's case*, 2 Co. 50, a, where it is held, that, if there is a lease to A. for life, remainder to another during the life of A., this is a good remainder; for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the book, 41 Edw. 3, Fitzh., tit. "Waste," 83; and this is followed by the late case of *Duncomb v. Duncomb*, Hil., 7 Will. 3, C. B., 3 Lev. 437, which was one of the first cases wherein [*583] the operation of such *limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant; because in the last case it comes the first estate of freehold, to the trustees, as was rightly reasoned by Lord Chief Justice Lee, in the case of *Smith v. Dormer*, and *Packhurst*, Mich., 14 Geo. 2 B. R.¹

It is plain, therefore, that these trustees had the immediate freehold in them—an estate *pour autre vie*; and at law they alone could maintain or defend any action concerning the freehold.

If a disseisin was committed they must bring the assize, and they must defend in all *præcipes*; for the possession of the tenant for years was, in law, their possession: for this reason they had in law an interest in the timber, not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession, by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste; the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance, and the Statute of Gloucester gave

¹ 8 Vin. Ab. 413; Willes' Rep. 327; 3 Atk. 135; 6 Bro. P. C. 351, Toml. ed.

the writ of waste to the same persons. But in this respect such trustees are in no other condition than all other remaindermen for life.

Thirdly. Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of *Mansell v. Mansell*,¹ (which must be more particularly mentioned by and by,) it was expressly laid down by Lord Raymond, as I took it from his own mouth—"It is only positive law that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to *preserve them; they are the creature of the Court, and properly [*584] under its direction and control."

The first trust is declared to preserve the contingent estates thereafter limited. How to preserve them? To preserve the inheritance as entire as possible—to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part—in more, the mines; and the destruction of the one, or the exhausting of the other, might take away, or be an alienation of, the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity.

For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom. Therefore, if, after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a court of equity in support of their trust, and not to break it upon the right of the tenant for life to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here. As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

*In the present case they were remaindermen pour autre vie, and immediate owners of the freehold in law. In the case of *Dayrell v. Champness*, 1 Eq. Ca. Ab. 400; Trin. 1700, a remainderman for life was admitted to maintain such a bill without making the owner of the inheritance a party; and although it was observed upon that case by Mr. Clarke, that it

appears by the state of it in the book that the plaintiff had the first remainder in tail, vested, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remaindermen of the legal estate *pour autre vie*, surely their trust, which affects their conscience, and, according to Lord Raymond's opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant *en ventre sa mere*.¹ And so is *Musgrave v. Parry*, 2 Vern. 710; which is liable to much more difficulty, for that must be as *amicus curiæ* on the unborn child's behalf.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this, then, into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled: this had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. Solicitor-General² very properly put in his argument—on what terms should they be discharged? This Court could not have fined them: therefore, certainly only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor [*586] the remote remainderman in fee, for *he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, justice could not have been done.

Fourthly. It comes next to be considered, how far and in what cases such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or laches, in breach of trust.

Notwithstanding the saying of Mr. Pollexfen, *arguendo* at the bar, (Pollex. 250,) "that trustees to preserve contingent remainders were never punished in equity when they broke their trust," (which, by the way, is a kind of contradiction in terms,) that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord Harcourt, in the case of *Pye v. Gorges*,³ Mich. 1710, where he declared, that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts:" and he said, if there was no precedent in the case, he would make one.

¹ See *Lutterell's case*, cited Prec. Ch. 50; *Scatterwood v. Edge*, 1 Salk. 229.

² Murray, afterwards Lord Mansfield.

³ Prec. Ch. 308; 1 P. Wms. 128; 2 Salk. 680; 7 Bro. P. C. 221, Toml. ed.

Then came *Tipping v. Pigott*,¹ in Mich. 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said it would be dangerous for such trustees themselves to make the experiment. Thus it stood till the great case of *Mansell v. Mansell*, which was first decreed by Sir Joseph Jekyll, at the Rolls, in January, 1731, and afterwards by Lord King, assisted by Lord Raymond and Lord Chief Baron Reynolds, Dec. 12, 1732.²

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in equity to make satisfaction for such a breach of trust; and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of *the trust, shall be decreed in equity to restore the estate; and in that case it was de- [*587] creed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build: suppose these trustees had consented to the felling and sale of the timber—had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted that they would bring no bill for an injunction—would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly follows from the principle on which the Court founded itself in *Mansell v. Mansell*. Lord Raymond said, “It was strange in natural reason to say, that, where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust.”

If the trustees had joined in the articles thus to break their trust, would Mr. Garth, the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it; which is expressly within the rules of *Mansell v. Mansell*. And here I cannot help repeating some remarkable words of Lord King, who was not disposed to amplify the jurisdiction of this Court. “If it is,” said his Lordship, “a breach of trust, and the trustees convey the estate over, a court of equity is not to sit still and let others profit by the spoil.”

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only laches or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme or attempt to strip the estate of the timber; *but how will it excuse the others, who, as Lord King expressed it, have profited by the spoil? By no [*588] means.

In all cases of alienation the alienees are not affected merely by act of the trustees, but by notice of the trust: and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. There-

¹ 1 Eq. Ca. Ab. 385; Gilb. Eq. Rep. 34.

² 2 P. Wms. 678; Ca. t. Talb. 252; 2 Eq. Ca. Ab. 747.

fore, in this case the actual notice of the trust operates to make the laches of the trustees affect them as much as their express act would have done in the other: and it would be strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a re-conveyance; indeed, it plainly follows by analogy from thence. Suppose an estate with valuable mines in it, unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation, with notice. Afterwards such a purchaser, with notice, opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born, who is tenant in tail: the tenant for life dies, and a son brings a bill for a re-conveyance: if, according to the authority of *Mansell v. Mansell*, the Court had decreed a re-conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainderman had neither *jus in re* nor *jus ad rem*, before he was in *rerum natura*; and no wrong can be done to a person non-existent. But these are colorable objections only: for, if equity out to wait, and expect the vesting of the estate for his *benefit, and restore him that estate, it ought to do [*589] it completely.

I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me that the plaintiff ought to be relieved in this court,) before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life and the first remainderman of the inheritance vested, either in respect of the timber or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new-invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainderman vested, to abridge the legal right of the former, to defeat and destroy the contingent use of the inheritance whilst it remains contingent and eventual, to abridge the legal right of the latter, to destroy it by accepting a surrender of the estate for life: all which are as much legal powers as the cutting down of timber or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger or of the tenant for life alone, the owner of the first

remainder of inheritance vested shall have the benefit of it. So was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of *Whitfield v. Bewitt*, 2 P. Wms. 240;¹ but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles's case*, 11 Co. 79, and **Udal v. Udal*, Aleyn, 81, an estate in contingency is as no estates till the contingency happens. And when the trees are severed the property must vest immediately in somebody, and that can only be in the first remainderman of inheritance vested; and on the foundation of that property he may maintain trover for them. [*590]

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of *the collusion* in this case. The destruction being made *by contrivance and collusion with the remainderman, and affecting his conscience*, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards: for, *in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.*

Second objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions even at common law. But, if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends upon principles of equity arising from the collusion and covin between the tenant for years and the remote remainderman, which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavor to show how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

*It is clear, that when there is a tenant for life,² with remainder over in fee or tail, and tenant for life commits waste, the remainderman in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance (being under limitation of the party) it would never go back again. [*591]

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance;

¹ 2 Eq. Ca. Ab. 589.

² [With remainder to another tenant for life.] Evidently omitted.

may, in case the remainderman for life does, living the remainderman of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder, or reversion in fee, and the remainderman, or reversioner in fee, grants over his remainder, or reversion to A. for the life of A. ; then the tenant for life commits waste, and afterwards, the grantor of the remainder, or reversion for life, dies, this remainderman, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder, or reversion for that time, by his own voluntary act.

All this appears by *Page's case*, 5 Co. 76, b, and the case of *Udal v. Udal*; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison; yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, [*592] and the lessee *for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done: yet, as it was out of him by tort, when it is revested, he shall have this remedy. Co. Litt. 356, a.

But there is another case at law, the reason of which seems to me to be more analogous to the present case; as that of a bishop, after the restitution of temporalities to him and his successors, in right of his church. When he dies, during the vacancy the right is in the king; and when a new bishop is invested with the temporalities, the fee is in him. Suppose, then, a tenant for life, or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done. Co. Litt. 356; Fitzh. N. B. 112.

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the Statute of Marlebridge, Cap. 29, against depredations upon the possessions of ecclesiastical persons, gave this remedy; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops or their possessions; and of this opinion is Lord Coke, in his reading on the Statute of Marlebridge, 2 Inst. 151. His words are, "This Act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons, being secular; for in the second clause of this Act, *hujus modi religiosorum* is mentioned for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in

law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore, the church, or religious house, is holden always one; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste for waste done in his *predecessor's time; but so [593] shall not a bishop, dean, arch-deacon, or the like, who are ecclesiastical persons secular, because the church, by their death, hath an alteration, and is not always one."

That the opinion of Lord Coke was, that the action is not founded on the Statute of Marlebridge, is clear by other cases; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessors' time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled that they cannot: 39 Edw. 3, 15; 2 Hen. 4, 2; 2 Roll. Abr. 8, 24; Pla. 3, 4, 5, 6, 7. From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law, which would not permit an estate, which it allowed to be created, and whilst it was in gremio legis, as it were, to be destroyed or stript without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity; and equity hath always gone further to restrain waste and destruction than the common law hath done.

Therefore, in the case already put, of an intermediate remainder for life, though the law allows no action of waste, this court sustains a bill for an injunction, and this ab antiquo, according to the case in Moore, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Richard II., 1 Roll. Abr. 377; 1 Vern. 23,¹ and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law dispunishable for waste by reason of the inheritance, which was once in him, yet Lord Chancellor Nottingham was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house: *Abrahall v. Bubb*, 2 Freem. 53; 2 Sho. 69.² In the same book there is the like case, before *Sir John [594] Trevor, M. R., 2 Freem. 278, Hil. 1704; and this hath been followed since, by several cases of tenant for life *without impeachment of waste generally*, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter or ornament of the mansion-house.

But this Court hath gone still further; and in the case of *Abrahall v. Bubb*, Lord Nottingham cites the case of a Lady Evelin, where there was tenant for life, remainder to the first son for life without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of

¹ Tracy v. Tracy.

² S. C., 2 Eq. Ca. Ab. 757.

trees growing for shelter or ornament; and this court granted an injunction against him, though no action whatsoever could be maintained at law: and upon the same ground, I did the like in the case of *Fleming* against the late *Bishop of Carlisle and others*. There the bishop was tenant for life, remainder to his eldest son for life, *without impeachment of waste*, with remainder over in fee; the eldest son, by permission of the bishop, entered and began to cut down the timber, and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

The case of *Robinson v. Litton*¹ went still further than the common law: that cause was heard in this Court, the 12th December, 1744. There was a devise to the defendant and his heirs; and if he should die before his age of twenty-one years, leaving no issue, then to the testator's first, &c., daughter in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold, and the money be applied for the benefit of the testator's daughters. The [595] defendant, being under the age of *twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third objection.—That, suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction.

In support of this notion, only one case was cited—*Jesus College v. Bloome*,² which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials of the premises, and converted them to his own use; the term was expired, and a new lease granted to a stranger, and the college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintain-

¹ 3 Atk. 209: 2 Eq. Ca. Ab. 528.

² 3 Atk. 262; Amb. 54, where the reports of the case differ from the account of it given here by Lord Hardwicke, and the bill was, it seems, dismissed, with costs.

able, without praying an injunction to stay the waste, and it stood over to another day, to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined, nor was that the only ground of the dismissal: but I was of opinion, that, at the utmost, it was in the discretion of the Court, and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this Court *after the lease expired. This is widely different from the present case in all its circumstances, and particularly that it is ad- [*596] mitted, that *the plaintiff here, though greatly damnified, can have no remedy at law*, which is a substantial difference.

Fourth objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured and laid out in land for the benefit of the contingent remainderman; and this could not be done, even upon a bill by trustees to preserve contingent remainders before the waste completed; and for this the case of *Whitfield v. Bewit*,¹ was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield v. Bewit* is, *the collusion and covin between the tenant for years and the remote remainderman in fee*; whereas, in that case, the remainderman in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed; but it was solely the tortious act of the tenant for life; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance, to the prejudice of the contingent remainderman, such an account and compensation must be decreed, in order to attain adequate justice.

On this I rely for an answer to that objection.

Fifth objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May, 1724; his father lived till 1727, and *he did not attain his age of twenty-one years till May, 1745; and this bill was brought in May, 1748, within three years after [*597] his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainderman in fee, after the death of a mesne remainderman for life, for waste done in his lifetime? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides,

in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar, and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder; which was in him by the will, and gained a new use; that this might have been a bar to a proper action of waste at law for waste done precedent; and, by parity of reason, ought to take away his remedy in this court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Litt. 53, b, Lord Coke lays it down, that, after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for, if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A. grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable; and so of the like, because the estate of the reversion continueth not, but is altered: and, consequently, the action of waste, for waste done before, which consists in privity, is gone.

This is undoubtedly law; but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, [*598] *which in *Lord Derwentwater's case*, before the judges and delegates, Hil., 6 Geo. 1, was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the Statute de Donis; and this was agreeable to the resolution of the case of *Abbot v. Burton*, 2 Salk. 590;¹ Trin., 7 Anne, C. B., and to the case of *Martin ex dem. Tregonwell v. Strachan*, adjudged in B. R., Hil., 16 Geo. 2, and affirmed in the House of Lords in February, 1743.²

But I go further still, and hold that, even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his his proper action of waste, yet still his property, in the timber severed before, would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: that an action of waste dies with the person; and, if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover, *pari ratione* he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit, that I cannot find any authority or precedent for

¹ 11 Mod. 181; Com. Rep. 160.

² 2 Stra. 1179; 4 Bro. P. C. 486.

maintaining an action of trover against an executor upon a conversion by the testator in his lifetime: though, as to this point, I give no opinion; for thus much is certain, that an action of trover will lie for an executor, upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the *action of trover for the timber was, as well as the strict action of waste would [*599] have been, gone at the common law; but, notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this court.

There have been several determinations in this court, where, by force of the rule, *actio personalis moritur cum persona*, the remedy at law hath been extinguished:¹ yet equity hath given the like satisfaction.

It is well known that, at common law, before the statute of 30 Car. 2, c. 7, and 4 & 5 Will. and Mary, c. 24, s. 12, no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets.

This is laid down as a rule in equity by Lord Chancellor Nottingham, in the case of *Price v. Morgan*, 2 Ch. Cas., fol. 215. His words are, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last; and, therefore, whatever estate of the wasting executor is come to his representative, which his testator wasted, the personal estate of such wasting executor, in the hands of his executor, shall answer."

When Lord Nottingham said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. 2; and the law was altered by Act of Parliament in the 30th of Car. 2.

In 1 Ch. Cas. 121, *Eton College v. Beauchamp and Biggs*,² the provost and fellows of Eton were possessed of a rent or pension of 1*l.* 14*s.* per annum, granted by King Henry VI. to that college, issuing out of the lands. The defendant, Biggs, was executor of the tenant, and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college did not know the lands out of which the rents were *issuable, and so could not distrain; and, though the person of the [*600] terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir Harbottle Grimstone, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

¹ See now 3 & 4 Wms. 4, c. 42, s. 2.

² S. C., 1 Eq. Ca. Ab. 32.

In 2 Mod. 293, *Anon. Error*, Hil. 29 Car. 2, in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices, the case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor. The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted to a stranger, absque hoc that Edward Nicholls was ever executor; but did not say by his plea, "or ever administered as executor;" for, in truth, he was executor de son tort. The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died; and to this replication the defendant demurred. Judgment was given for the plaintiff, in the Court of Exchequer, but reversed in the Exchequer Chamber; for an executor of an executor de son tort is not liable at law; though the Lord Chancellor Nottingham said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, *that in all cases of fraud the remedy doth not die with the person*; but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For, as *equity disclaims the maxim, that a personal remedy dies with the person whenever the remedy is proper for that jurisdiction*, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction. Now, collusion between two persons, to the prejudice and loss [*601] of a third, is, in the eye of the Court, the same as a fraud; *and, you have observed, that one principal ground of the judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavor to avail themselves—I mean the argument ab inconvenienti, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remaindermen, springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down that a contingent remainderman cannot possibly have any remedy in such a case—I say, let them be compared, and the former will weigh nothing, in the opposite scale, against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements; and it frequently happens that the first remainderman of the inheritance vested is a remote relation—remote in blood,

and remote in the prospect of succession, perhaps after fifty years' contingent limitation of that inheritance.

If what has been done in this case should be determined to be done impune, without any possible recompense in a court of equity, what havoc would it make, and what a license would be proclaimed! Every remainderman in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant, strip the *estate, and convert the value of it to their own use. Suppose an [*602] estate in the great timber countries of England, in the north, or in Cornwall, where the principal value may consist in timber or mines, all that value may be exhausted and dissipated before a first son is born; and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honor.

It will be no answer to this, to say the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know of it, nay, possibly before they can know whether they are trustees or not; for it most frequently happens, that trustees to preserve contingent uses are inserted in settlements and wills, without their being made acquainted with it.

From hence it is evident that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance, from the practice and abuses of the times into which we are fallen, when so many new inventions and contrivances daily show themselves in courts of justice, to supply or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the judges in *Fermor's case*, 3 Co. 79, a; and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the statute of the 4th of Hen. 7, c. 24; but the book says—“Lastly, the judges in this resolution did greatly respect the general mischief which would ensue if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance.”¹

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of his assets; and if the original limitations *had been still subsisting, I must have directed [*603] this money to have been laid out in the lands to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it: the principal money is reckoned by the answer at £1000; the cause being heard on bill and answer, and the plaintiff having at the bar prayed interest from the time it was received, in respect of the possible growth of timber.

¹ See 3 Co. 79, a.

But there being no proof, it does not appear what was the condition of the timber; whether, by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests or accidents; or what young timber may have grown up in its place in the mean time; from these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

¹ "His Lordship declared, that, on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this Court for so much value of his inheritance as the defendant's testator exhausted and received by virtue or color of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of ninety-nine years, if he should so long live; and ordered that the Master, to whom he referred it, should compute interest on the sum of £1000, admitted by the answer of Sir John Hind Cotton, deceased, to have been received by him, from the time of filing the plaintiff's bill, after the rate of four per cent. per annum, and tax the plaintiff his costs; and that what shall be so found due to the plaintiff for the £1000, interest and costs, be considered as a demand by simple contract on the estate of Sir John Hind Cotton, deceased, and be answered and paid to the plaintiff by the defendants, the executors, they having admitted assets of their testator, Sir John Hind Cotton, by their answer to the bill of revivor."

[*604] **Garth v. Cotton* (the judgment in which is said by Lord St. Leonards, in his learned work upon Powers, to be one of the ablest ever delivered,) is here given complete, the statement of the case, and the arguments, having been taken from 1 Ves. 524, 546; the judgment from 1 Dick. 183, where it is stated to have been copied from Lord Hardwicke's MS.; and the decree from 3 Atk. 758.

Under the devise, in *Garth v. Cotton*, to the plaintiff's father, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, Lord Hardwicke considered him as punishable for *wilful waste*, and that he had no present right to or interest in the timber, other than the mast, and shade, and necessary botes, the exception of "voluntary waste" rendering the preceding part of the clause, "without impeachment of waste," (which, standing alone, would have conferred upon him the power of felling the timber,) of no effect.

See the remarks upon *Garth v. Cotton*, in the recent case of *Vincent v. Spicer*, 22 Beav. 380, where Sir John Romilly, M. R., terms it "a very strong case, (p. 385.) The facts there were briefly as follow:—Sir F. Vincent, on his marriage, settled his estate on himself for life, "without impeachment for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." It was held by his Honor, that Sir F. Vincent

¹ Decree taken from 3 Atk. 758; Reg. Lib., 1752, A., fol. 240.

was entitled to cut all such timber, (except ornamental,) as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management.

The importance formerly of the limitation to trustees to preserve contingent remainders, the history of which is so admirably given by Lord Hardwicke, is well illustrated in *Garth v. Cotton*; for, as the plaintiff's father was only tenant for years, if there had been no such limitation, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right to commit waste.

If the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could, even then, have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainderman vested; and there could have been no pretence for the Court to interpose, to preserve, or restore to him part of that *inheritance, the whole of which was in the power of the [*605] tenant for life.

The foundation of the plaintiff's equity depended entirely upon the estate limited to the trustees to preserve contingent remainders; it was their duty to preserve the inheritance, consisting of the land, timber, and mines, entire. The trustees might have brought a bill to stay waste against the act of the plaintiff's father and the remainderman; and Lord Hardwicke expressly decided, that their neglect or ignorance of their duty should not prejudice the tenant in tail not in esse at the time when the waste was committed.

It was, indeed, admitted by Lord Hardwicke, that where there is tenant for life, or for years, subject to waste, if timber is blown down by accident, or cut down by the tort of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested should have the benefit of it; because, he observes, "The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowle's case*, 11 Co. 79, and *Udal v. Udal*, Aleyn, 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainderman of inheritance vested; and on the foundation of that property, he may maintain trover for them. This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him." See *Whitfield v. Bewit*, 2 P. Wms. 240, and *Duke of Newcastle v. Vane*, there cited; but, in *Garth v. Cotton*, the timber was not blown down by accident, or cut by the tort of a stranger, or of a tenant for life alone, but was fallen by the tenant for years and remote remainderman, *in collusion together*, who, although at law entitled to the proceeds arising from the sale, were in equity (which has always interfered in matters of waste

more extensively than courts of law,) held accountable to the tenant in tail not then in esse, because they had collusively committed an act which greatly damnified him, and for which he had no remedy at law. The same result would have followed had Garth been tenant for life instead of tenant for years.

Upon the same principle, where there was a limitation in a settlement to A. for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, with reversion in fee to A., A. cut down timber; but Lord Hardwicke, upon a bill being filed by B., the second tenant for life, [*606] granted an injunction, observing, *that the trustees to preserve contingent remainders might have brought a bill against the defendant to stay waste, for the benefit of the contingent remainders; and that the plaintiff could do so, because, though he had no right to the timber, yet if the defendant, the first tenant for life, should die without issue, he would have an interest in the mast and shade of the timber. *Perrot v. Perrot*, 3 Atk. 94; *Davies v. Leo*, 6 Ves. 784; and the money arising from the sale of the timber in such a case will be preserved for the contingent remaindermen: *Williams v. Duke of Bolton*, 3 P. Wms. 268, Cox's note.

By 8 & 9 Vict. c. 106, s. 8, it is enacted, "that a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of the act, shall be deemed to have been capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of *any preceding estate of freehold*, in the same manner, in all respects, as if such determination had not happened." Suppose, in a case coming within the act, the limitation to trustees to support contingent limitations is omitted, could either a tenant for years, or a tenant for life, with the person in whom the first remainder of the inheritance is vested, cut the timber without being liable to be called to an account by the contingent remaindermen when they come in esse? In *Garth v. Cotton*, Lord Hardwicke, as before observed, expressly admits, that if there had been no trustees to support contingent remainders, in neither of these cases could relief be had in equity. It is, however, presumed, that in the latter of these cases, that is to say where there is a tenant for life, relief might now be had by the contingent remainderman, because his inheritance, of which the timber is part, is no longer in the power of the owner of the previous estate of freehold. But in the former of these cases, that is to say where there is a tenant for years, no relief could be had, because, notwithstanding the late act, the contingent remainders would be void for want of an estate of freehold to support them. Where, therefore, the legal fee is not vested in trustees, a limitation to trustees to support contingent remainders may still be necessary, when there is only a previous estate for years; and it is conceived, that even where there is a previous estate of freehold, it may still be useful, as the trustees to support contingent remainders can, by an application for an injunction before the contingent remainderman comes into esse, protect his estate from waste.

In the case of an executory devise, Lord Hardwicke, in *Robinson v. Litton*, 3 Atk. 209, said that he should doubt whether an heir-at-law ought not to be

restrained *from committing waste in the mean time. In that case [*607] the testator devised lands to his son and his heirs, but in case he should not attain twenty-one, and die without issue, then he gave the lands to his daughters, and directed them to be sold and the money to be divided among the daughters. The son, who wanted three-quarters of a year of twenty-one, intended cutting down £3000 worth of timber; but Lord Hardwicke granted an injunction to restrain him, and at the hearing made that injunction perpetual, observing, "It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters." And Lord Eldon, in the case of *Stansfield v. Habergham*, 10 Ves. 278, stated it to be the doctrine of the Court, that, where there is an executory devise over, even of a legal estate, a court of equity will not permit the timber to be cut down, more especially not, if there is an executory devise of a trust estate.

One of the first instances of the interposition of equity, where an action of waste could not be maintained at law, seems to have been the case put by Lord Hardwicke, in *Garth v. Cotton*, of a tenant for life, with remainder to another for life, with remainder over in fee, or in tail. In such case the remainderman in fee, or in tail, though he might bring an action of trover for the trees, could have no action of waste; because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance, it would never go back again. He might, it is true, have another action of trover for the trees. However, in equity, to use the words of Lord Hardwicke, "this Court sustains a bill for an injunction, and this ab antiquo, according to the case in *Moore*, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Richard II." See also *Tracy v. Tracy*, 1 Vern. 23; *Farrant v. Lovel*, 3 Atk. 723; and an injunction will be granted at the suit of a mesne remainderman for life, without making the owner of the inheritance a party: *Dayrell v. Champness*, 1 Eq. Ca. Ab. 400. But see *Mollineux v. Powell*, 3 P. Wms. 268, n. "So, where there is tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainderman, before the time comes when the second tenant for life's power commences,"—per Lord Hardwicke, C., in *Robinson v. Litton*, 3 Atk. 210.

So, a ground landlord may have an injunction to stay waste against an under lessee, who holds by lease from the original lessee: *Farrant v. Lovel*, 3 Atk. 723.

*So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the Court, on a bill brought by the mortgagor to stay waste, will grant an injunction: *Farrant v. Lovel*, 3 Atk. 723. [*608]

A mortgagee in possession may be restrained by the mortgagee from felling timber: (*Farrant v. Lovel*, 3 Atk. 723; *Usborn v. Usborn*, 1 Dick. 75; *Humphreys v. Harrison*, 1 J. & W. 581;) but not, it seems, unless he makes it

appear that the security would be insufficient or scanty without the timber : *Hippesley v. Spencer*, 5 Madd. 422 ; *King v. Smith*, 2 Hare, 239.

It seems to be now settled that the Court will not interfere to prevent or to remedy permissive waste. The contrary opinion seems formerly to have prevailed. Thus, in *Parteriche v. Powlet*, 2 Atk. 383,) where an exception was taken to the Master's report, that he had charged the tenant for life *without impeachment of waste*, with several sums for the repairs of tenants' houses upon the estate, Lord Hardwicke, C., overruled the exception, and said, "Notwithstanding tenant for life is without impeachment of waste, he shall be obliged to keep tenants' houses in repair, unless the charge is excessive, and shall not suffer them to run to ruin." However, in *The Marquis of Lansdowne v. The Marchioness Dowager of Lansdowne*, (1 J. & W. 522,) an account against the representative of tenant for life without impeachment of waste, for dilapidations in and about a mansion-house, was refused by Sir John Leach, M. R., who, although the case of *Parteriche v. Powlet* was cited, expressed himself to be satisfied that no account of dilapidations could be decreed, observing that, with respect to incumbents, the law was otherwise, and accordingly suits against their representatives were very common ; but no instances of such suits by remaindermen had occurred.

So, in *Powys v. Blgrave*, (4 De Gex, Mac. & G. 448,) where a testator by his will directed his trustees, after payment of the expenses of keeping his estate in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and after payment thereof, to pay the rents to two persons successively for life, with remainder to trustees to preserve, with remainder to first and other sons of the second tenant for life successively in remainder, and the several heirs male of the body of such sons. A bill was filed by the trustees, at the instance of one of the remaindermen in tail, against [*609] the second tenant for life, for the purpose of making him liable *for permissive waste ; it was held by Lord Cranworth, C., affirming the decision of Sir W. Page Wood, V. C., (Kay, 495,) that the Court could not interfere in cases of permissive waste. "It was argued," said his Lordship, "independently of the trust, that it is the duty of the tenant for life to repair 'Equitas sequitur legem.'" But even legal liability now is very doubtful : *Gibson v. Wells*, (1 B. & P. N. R. 291 ;) *Heirne v. Benbow*, (4 Taunt. 764.) Whatever be the legal liability, the Court has always declined to interfere against mere permissive waste : *Lord Castlemain v. Lord Craven*, (22 Vin. Ab. 523, tit. "Waste," pl. 11,) there the Master of the Rolls said, "the Court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in wilful waste." On this ground relief was refused in *Wood v. Gaynon*, (Amb. 395.) In that case, a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners ; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying, that as there was no precedent he would not make one ; adopting the argument, that it would tend to harass tenants for life and jointresses, and that suits of this

kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwell v. Baylis*, (2 Mer. 408,) it does not sustain the doctrine for which it was cited. The case of *Re Skingley*, (3 Mac. & G. 221,) was founded on the express obligation of the lunatic to keep in repair. See also *White v. Cann*, 1 Ir. Ch. Rep. 205.

As to the legal liability for permissive waste, see *Greene v. Cole*, 2 Wms. Saund. 252, and notes; and *Harnett v. Maitland*, 16 M. & W. 257.

But an account would be granted where there is an express covenant from the tenant for life to repair: *Marsh v. Wells*, 2 S. & S. 87.

At common law, the clause, *without impeachment of waste*, only exempted a tenant for life from the penalty of the statute, the recovery of treble value, and the place wasted, not expressly giving the property of the thing wasted; but, in *Lewis Bowles's case*, 11 Co. 79, it was determined that these words also gave the *property*. The necessary consequence of which was, that, in general, unless in particular circumstances, as, for instance, where the exemption from liability to waste is made subordinate to a discretionary power in trustees to fell timber, (*Kekewich v. Marker*, 3 Mac. & G. 311; and see *Briggs v. Earl of Oxford*, 5 De Gex & Sm. 156;) a tenant for life *without impeachment of waste* cannot be restrained in equity from committing waste; for that would be to determine that he should not make *use of the property which the [*610] law allowed him. But, afterwards, several instances were considered, in which this very large power might be exercised contrary to conscience, and in an unreasonable manner, by a tenant for life: as, where his act was to the destruction of the thing settled, and equity interfered. See *Aston v. Aston*, 1 Ves. 265.

A leading authority upon this subject is *Vane v. Lord Barnard*, 2 Vern. 738, commonly called *Lord Bernard's case*; there Lord Barnard, who, under the marriage settlement of his son, was tenant for life *without impeachment of waste*, of Raby Castle, with remainder to his son for life, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, &c., to the value of £3000. Lord Cowper granted an injunction to stay committing of waste by pulling down the castle, and decreed that the castle should be put in its former condition; and, for that purpose, a commission was to issue to ascertain what ought to be repaired, and a Master was directed to see it done at the expense of Lord Barnard, and decreed the plaintiff his costs. See S. C., Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ca. 399; 1 Salk. 161; and see *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239.

So, likewise, upon the principle of restraining a tenant for life without impeachment of waste from exercising his legal power contrary to conscience, and in an unreasonable manner, Lord Hardwicke said, that if tenant for life without impeachment of waste, pulled down farm-houses, in general he would no more scruple restraining him, than he would from pulling down the mansion-house, (unless he pulled down two to make into one, in order to bear the burthen but of one,) it tending equally to the destruction of the thing settled. So, if he should grub up a wood settled, so as to destroy the wood absolutely, he should

restrain him, as it would be what is termed in *Abraham v. Bubb*, 2 Freem. 54, *extravagant and humorsome waste*: *Aston v. Aston*, 1 Ves. 265.

Although a tenant for life without impeachment of waste, and a tenant in tail after possibility of issue extinct, may fell all the ordinary timber upon the estate, it has long been established, that a court of equity will restrain them from committing what is called *equitable waste*, by felling timber planted or left standing for the shelter or ornament of a mansion house or grounds: ([*Clement v. Wheeler*, 5 Foster, 361;] *Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759; *Packington's case*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. C. C. 166; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549;) even if planted by the tenant for life himself: *Coffin v. Coffin*, Jac. 71.

*"The principle upon which the Court has gone, seems to be, that if [*611] the testator, or the author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and, upon a competition between those parties, the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and, it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court,"—per Lord Eldon, in *Marquis of Downshire v. Lady Sandys*, 6 Ves. 110. So, likewise, Sir William Grant has observed, "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental:" *Lord Mahon v. Lord Stanhope*, 3 Madd. 523, n.; and see *Burgess v. Lamb*, 16 Ves. 174; *Coffin v. Coffin*, Jac. 70; *Marker v. Marker*, 9 Hare, 1, 17.

"The principle has been extended from the ornament of the house to out-houses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles round,"—per Lord Eldon, C., 6 Ves. 110; and see *Jebb v. Jebb*; *Johnes v. Johnes*, and *Lord Tamworth v. Lord Ferrers*, cited 6 Ves. 110; *Williams v. M'Namara*, 8 Ves. 70; but although the protection may be afforded to rides or avenues at a considerable distance from a mansion, it will not necessarily be extended to the woods through which they pass, so as to prevent their being cut for repairs: *Wombwell v. Belasyse*, 6 Ves. 110, a, n., 2nd ed.

In *The Marquis of Downshire v. Lady Sandys*, 6 Ves. 107, the injunction was extended to clumps of firs on a common two miles from the house, although land belonging to other persons intervened. "If," observed Lord Eldon, C., "the principle has been rightly applied, it is very difficult in argument to say, it cannot be applied to a common as well as infield lands, and that the contiguity or remoteness, *if de facto it was planted for ornament*, can alter the principle upon which the rule of the Court is to be applied." And in *Day v. Merry*, 16 Ves. 375, the principle applicable to equitable waste was extended to trees planted for the purpose of excluding objects from view.

But circumstances may render the falling of ornamental timber justifiable.

"For, if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would *be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste,"—per Sir William Grant, M. R., in *Lord Mahon v. Lord Stanhope*, 3 Madd. 523, n. [*612]

So it seems that timber might be cut which injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter, that the removal of the timber so cut was essential to such purposes of ornament or shelter: *Lushington v. Boldero*, 6 Madd. 149, 150.

So, likewise, ornamental timber may be felled if it be so near to a house as to be prejudicial to its healthiness, but the onus of proof will lie upon the persons felling the timber. See *Campbell v. Allgood*, (17 Beav. 623;) there trustees, at the request of a tenant to whom they had let a house, cut down some beech trees, and a large horse-chestnut, which sheltered the windows of the mansion-house and servants' hall, and were about to cut down more. Sir J. Romilly, M. R., granted an injunction against the trustees, although he refused it as to the tenant, as it was not shown that he either had, or was about to commit, any waste. "Upon the result of the evidence," said his Honor, "I think that these trees did form a shelter to and hide that part of the house, which, as it contained the offices, probably was the most unsightly. I am of opinion, also, that the horse-chestnut tree was, to some extent, prejudicial to the healthiness of the house, but I am not satisfied that such was the case with respect to the beech trees. The burthen of proof lies on the trustees to satisfy me that they were prejudicial, for they had no authority to cut trees which were ornamental, and conducive to the beauty of the house. I think they ought to have applied, either to the persons interested in the property for their assent, or to the Court for its authority in cutting these trees; and as they have not satisfied me that it was absolutely necessary for the well-being, salubrity, and comfort of the residence, that these trees should be cut, I think I must grant an injunction."

It has been observed, that ornamental timber has been protected from its connection with a mansion-house or its grounds: the question, therefore, naturally arises, whether, when a mansion-house has been pulled down, the Court will still interfere to preserve the timber.

Where the owner in fee of an estate, with a mansion-house upon it, and trees planted, or left standing for ornament around or about the mansion-house, pulls it down without any intention of rebuilding, a tenant for life without impeachment of waste, under the will of such an owner, is *entitled to cut down the trees. See *Micklethwait v. Micklethwait*, 5 W. R. 861. [*613] There the testator was tenant for life of estates at Beeston and Taverham, with remainder to his eldest son and his issue male, with remainder to himself in fee. In the year 1827, the testator abandoned Beeston as a place of residence; and, in 1846, with the consent of his eldest son, he pulled down and demolished the house, without any intention of rebuilding it. By his will,

dated the 29th of May, 1852, the testator devised the two estates to his second son, the defendant, for life, without impeachment of waste, except voluntary waste in pulling down buildings without rebuilding them, with remainder to his issue, with remainder to the plaintiff. The testator died in 1856. Afterwards, his eldest son died without issue, whereupon the defendant entered into possession as tenant for life under the testator's will. He threatened to cut down the trees in the avenue and park at Beeston. It was held by the Lords Justices of the Court of Appeal, dissolving an injunction granted by Sir W. Page Wood, V. C., (reported, 3 Jur. N. S., 765; 5 W. R. 640,) that as between the parties to the suit the testator was to be regarded as if he had been owner in fee of the estate when he made his will, and that as he had pulled down the mansion-house, the Court would not interfere to protect the trees in the avenue and park as ornamental. "If," said Lord Justice Turner, "a deviser, or settlor, occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state of occupation, and devises or settles it, so as to go in a course of succession, he may reasonably be presumed to anticipate, that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he himself enjoyed. This Court, therefore, in such a case, protects the trees against the acts of the tenant for life. But if, on the other hand, the deviser or settlor himself pulls down the mansion-house, upon what ground is it to be presumed that he intended that which is incident to the mansion-house to be preserved? Is it to be presumed that he meant that the incident should be preserved when he has himself destroyed the principal? It was said for the plaintiff that the testator may have intended that the trees should be preserved as an ornament to the estate without reference to the mansion-house, and it was argued that if the trees were, in fact, planted, or left standing for ornament, it could make no difference whether there was a mansion-house on the estate or not; but there is a plain difference between cases in which there is, and cases in which there is not, a mansion-house on the estate. In the former *case, continued [*614] residence may well be presumed to have been contemplated; in the latter case it cannot. There is another consideration which seems to me to have an important bearing upon this case. These trees are assumed to have been planted for ornament to the mansion-house; are they to be preserved for ornament to the estate when the mansion-house is pulled down? Are trees which are planted for one purpose to be protected for another? The difficulty in which the Court will be involved if it carries the doctrine of equitable waste to the length contended for by the plaintiff is, I think, also a matter not unworthy consideration. It is already difficult in many cases to determine whether trees have been planted or left standing for ornament, but the existence of the mansion-house generally furnishes some criterion for determining the point. How is the loss of that criterion to be supplied?"

Where, however, it is either proved, or may be inferred, that in demolishing, or after the demolition of a mansion-house, a testator intended, designed, or wished to rebuild it, or to reside at, or erect a mansion-house, or place of

residence on that estate, or intended, designed, or wished, that any devisee under his will should do so, timber, which was ornamental to the mansion-house while in existence, might be protected by the Court from being felled by a tenant for life without impeachment of waste. See the remarks of Lord Justice Knight Bruce in *Micklethwait v. Micklethwait*, 5 W. R. 862.

In two well known cases, the ornamental timber has been protected although the mansion-house has been pulled down. The first of these cases is, *Wellesley v. Wellesley*, 6 Sim. 497; there a mansion-house, park, and pleasure-grounds, and several ornamental villas near the park, were limited in strict settlement, under which the defendant was tenant for life without impeachment of waste, with remainder to his first and other sons, successively in tail male. And the tenant for life in possession was empowered to grant *building leases* of the settled estates, and the trustees were empowered, at the request of the tenant for life, to cause the mansion-house to be pulled down, or any other-mansion houses which then were, or should be, standing upon any part of the estates, without rebuilding the same, and to sell the materials thereof, and apply the proceeds in paying off incumbrances on the estates. When the settlement was executed, the park, pleasure-grounds, and gardens, contained a great number of trees which had been planted, or were left standing for the ornament or shelter of the mansion-house, park, and pleasure-grounds, in clumps, lines, avenues, or vistas, or in single trees; and the lands *adjoining to, and forming the approaches to the mansion-house, park, [*615] and pleasure-grounds, also contained a great number of trees which had been planted, or left standing, for the ornament or shelter of the mansion-house, park, and pleasure-grounds, and also of the villas contiguous thereto. The mansion-house was pulled down pursuant to the power, and the materials sold. The bill alleged that a large proportion of the trees marked for felling were not-fit to be felled for timber, and that by the felling thereof, the whole of the demesne would be laid waste and become wholly incapable for a very long period of years of being applied to the purposes of a residence, either by the persons who, under the settlement, might thereafter become entitled in *possession* to the inheritance of the domain, or by those to whom such persons might *demise the same*, and that the lands and messuages erected thereon, would be greatly injured or lessened in value. The bill prayed that the defendant might be restrained from cutting down any timber or other trees then standing in and upon the park, garden, and pleasure-grounds, and which were planted or growing there for the protection or shelter of the park, garden, and pleasure-grounds, or for the ornament thereof, and from felling or cutting down any timber or other trees which were planted, and stood, or grew in avenues, vistas, or clumps, or separately or singly, for the ornament of the park, garden, and pleasure-grounds, or other grounds and lands thereto belonging. Sir L. Shadwell, V. C., granted an injunction *ex parte*; and Lord Lyndhurst, C., refused to dissolve it on the coming in of the answer. It was argued upon the hearing that there was no case in which, the mansion-house having been pulled down under a provision of the settlement, the Court had protected the timber which would have been ornamental to it if it had remained; that the

timber was connected with the house, and the house being gone, the protection of the Court had ceased. But Sir L. Shadwell, V. C., made the injunction perpetual, considering, as no new evidence was produced, that he was bound by what Lord Lyndhurst had done.

The other case is that of *Morris v. Morris*, 15 Sim. 505 ; there estates were settled by the grandfather of the plaintiff on himself for life, remainder to trustees for 1000 years upon certain trusts, and subject thereto to the use of the same trustees during the life of the defendant, (the son of the settlor,) *without impeachment of waste*, (provided the same should be committed or suffered with the privity and assent of the defendant,) upon trust, to preserve the contingent remainders thereafter limited, and to permit the defendant to receive the rents of the estates during his life, with remainder to the use of [*616] *the plaintiff during his life, with remainder to the use of the plaintiff's first and other sons successively in tail male, with remainder to the use of himself in fee. And the settlor reserved to himself, and gave to the defendant and plaintiff, when they should be in possession or in receipt of the rents of the estates, power to grant *building leases*. On the death of the settlor, the defendant entered into possession of the estates ; and, whilst the plaintiff was an infant, pulled down the mansion-house thereon. Some years after the plaintiff had attained twenty-one, the defendant felled some, and marked for felling other trees, which his father had either planted or left standing and growing for the ornament or shelter of the house, in the lawns, gardens, and pleasure-grounds belonging to it. Whereupon, the bill was filed to restrain the defendant from felling any more trees, but did not ask any relief with regard to the pulling down of the house. Sir L. Shadwell, V. C., granted the injunction. "It appears to me," said his Honor, "that the general rule regarding trees planted for shelter and ornament must apply to this case, unless upon the face of the settlement, or independently of the settlement, you can show that the rule is not applicable. I admit that this case differs very widely in some respects from the case of *Wellesley v. Wellesley* ; but I observe that there is a power in the settlement to demise to persons who shall be willing to build houses or to repair houses ; and I think that that does tend to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament. Because, though the mansion-house, which the trees were intended to shelter and ornament, no longer exists, yet there is a possibility of leases being made for the purpose of building houses, which may receive a benefit from the ornament or shelter afforded by the trees ; and, in that respect, it is something like the case of *Wellesley v. Wellesley*. But my opinion is, that I am bound to administer the general law of this court, which will not permit the person who is merely tenant for life without impeachment of waste, to cut down these trees, which, it is admitted on all hands, were either planted or left standing for shelter and ornament."

With reference to the case of *Morris v. Morris*, Lord Justice Turner has observed, that there seem to be two grounds on which the injunction in that case was granted ;—that the *tenant for life* could not, by pulling down the

mansion-house, entitle himself to the ornamental timber; and that if he was justified in pulling down the mansion-house by reason of the estate in trustees being unimpeachable of waste, provided it was with his assent, there was an intention *to rebuild, to be collected from the power to grant building [*617] leases; and that it was upon the latter ground, and upon the ground of there being villas upon the estate, and the general scope of the settlement, that the case of *Wellesley v. Wellesley* seems to have proceeded. See 5 W. R. 864.

A court of equity will restrain a tenant for life *without* impeachment of waste, from cutting down saplings not proper to be felled, (*O'Brien v. O'Brien*, Amb. 107; *Marquis of Downshire v. Lady Sandys*, 6 Ves. 108;) and from cutting underwood before it is of sufficient growth, (*Brydges v. Stevens*, 6 Madd. 279;) but not from felling timber, merely because it is not full grown or proper for building; for, as observed by Lord Hardwicke, C., the reasoning of the cases of pulling down farm or mansion-houses, or felling trees planted for ornament or shelter, does not come up to this. The consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled, although it tends to its prejudice for a time, for timber will grow again in a few years: not so of houses. Nor will young trees planted in avenues, pulled down, serve for the purpose as before; for, having been put there for the convenient enjoyment of the house, they are considered as appurtenant thereto, and can no more be destroyed by such tenant for life than the house itself. But it would be very dangerous for the Court to use such latitude as to extend this to the taking away the profits of the estate by tenant for life, to the prejudice of the remainderman, which his estate for life without impeachment for waste, gives him liberty to do: *Aston v. Aston*, 1 Ves. 266; and see *Coffin v. Coffin*, Jac. 72.

A tenant in tail without possibility of issue extinct, although unimpeachable of waste at law, (*Lewis Bowles's case*, 11 Co. 79; *Williams v. Williams*, 15 Ves. 428; 12 East, 209,) is within the principle of equitable waste, and will be restrained from committing malicious or extravagant waste, such as cutting down ornamental timber, and pulling down houses. "The common case," observes Sir John Leach, "of a tenant in tail after possibility of issue extinct, is where the estate is descendible to the issue of the wife alone. Until the death of the wife without issue, this estate has all the legal incidents of other estates tail; but upon the death of the wife without issue, the estate has no longer a descendible quality, and the husband's interest is, in effect, limited to his life. His estate becomes ranked in the law amongst estates for life, and he may make exchange with a mere tenant for life. In *Lewis Bowles's case*, 11 Co. 79, however, it was held at law, that, as he had, before the death of his wife, an estate tail, and was once owner of the timber, that, notwithstanding *the death of his wife, and the change in the quality of his estate, [*618] he should still continue unimpeachable of waste. In a court of law, therefore, a tenant in tail after possibility of issue extinct, is, in effect, a tenant for life without impeachment of waste; and courts of equity have, in the question of equitable waste, confounded him with other tenants for life with-

out impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision of the grantor, but as a legal incident to his estate:" *Attorney-General v. Duke of Marlborough*, 3 Madd. 538. See, also, *Abraham v. Bubb*, 2 Show. 69; 2 Freem. 52; 2 Eq. Ca. Ab. 757; 2 Swanst. 172; *Anon.*, 2 Freem. 278; *Cooke v. Whalley*, 1 Eq. Ca. Ab. 400.

The orders to restrain equitable waste by the destruction of timber planted for shelter or ornament, or of too young growth, are generally drawn up in the terms used in *Chamberlayne v. Dummer*, viz., "that an injunction be awarded to restrain the defendant, Harriet Dummer, her servants, workmen, and agents, from cutting down any timber and other trees growing on the estate in question, which are planted or growing there for the protection or shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, or other grounds thereunto belonging; and that the injunction do also extend to restrain the said defendant her servants, workmen, or agents, from cutting down any timber or other trees, except at seasonable times, and in a husbandlike manner; and also from cutting down saplings or young trees not fit to be cut, as and for the purposes of timber, until the hearing of this cause, or further order of the Court."—Reg. Lib. A., 1781, fol. 452.

Where there has been a trust or restriction created for the preservation of ornamental timber, the Court will endeavor to enforce it, as it is not like a trust for purposes of benevolence, as to which the objects are unlimited and no standard can be found. *Marker v. Marker*, 9 Hare, 1, 18, 20.

But a court of equity will not interfere with an ordinary tenant in tail, who may, at his pleasure, cut down all timber for whatever purpose planted, or pull down all buildings upon his estate; for, as observed by Sir John Leach, V. C., "With the exception of alienation including leases, unless according to the statute, a tenant in tail is at this day to be considered as much the absolute owner of the estate as a tenant in fee simple, and, as such, may do what he pleases with the buildings and timber on the estate:" *Attorney-General v. Duke of Marlborough*, 3 Madd. 532; *Saville's case*, cited ante, p. 13.

[*619] *It seems that tenants in tail, restrained by statute from barring their issue, or those in remainder with reversion to the Crown, are not, on that account, within the principle of equitable waste; for, to use the words of Sir John Leach, V. C., "They have all the legal rights and incidents which belong to an estate of this character, except where such rights and incidents are specially qualified by the provisions of the statute, and there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber as if they were tenants in fee simple. . . . No instance can be stated in which a court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste." See *Attorney-General v. Duke of Marlborough*, 3 Madd. 498, 536, 539. However, his Honor in that case held, on demurrer, that the Duke of Marlborough for the time being is, under the act 5 Anne, c. 3, bound to maintain Blenheim-house for the future residence of those to whom the succession was

limited, and that the Court was bound to interfere to prevent the destruction of the house, and of the ornamental timber about it. "I am clearly of opinion," said his Honor, "that the Duke of Marlborough, having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house, and I must overrule a demurrer which, in effect, insists upon an absolute and unqualified right to cut all timber."

One important objection taken in *Garth v. Cotton* was this, that, although it was admitted a bill might have been maintained by the trustees to preserve contingent remainders, to stay waste before it was committed, yet it did not follow from thence, that after that was over, a bill might be brought for an account; and it was argued, that the jurisdiction of the Court to decree an account of the value of the timber was only incident to the jurisdiction of granting an injunction. In the previous case of *Jesus College v. Bloome*, 3 Atk. 262, Amb. 54, where a bill was brought solely to have an account and satisfaction for waste in cutting down trees and carrying off stones, against the defendant, an assignee of the lessee of the college, after an assignment of the term, and for waste done before assignment, Lord Hardwicke, C., according to the reports, dismissed the bill with costs, although he himself says, in *Garth v. Cotton*, that it was dismissed without costs. "The first question," said his Lordship, "is, whether bills are to be maintained in this court, merely for timber cut down after the term is gone out of the tenant by assignment? or whether such bills can only be brought for an account of such waste done, without, at the same *time, praying an injunction? and I am of opi- [*620] nion that they cannot. Waste is a loss for which there is a proper remedy by action. In a court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore, there is no ground of equity to come into this Court, for satisfaction of damages is not the proper ground for the Court to admit of these sorts of bills, but the staying of waste, because the Court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray, at the same time, an account of the waste done; for, though a court of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done, at the same time with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the Court will direct an account to be taken." So, in *Smith v. Cooke*, 3 Atk. 381, Lord Hardwicke, C., took the same distinction. He said, that "after the estate of the lessee is determined, and a new lessee is in possession, a person, merely for an account of timber felled by way of wrong, could not come into a court of equity. But where the person continues in possession, and, consequently, in a condition of committing more waste, there a person is proper to come into equity for an injunction to stay waste;" and though the plaintiffs in that case had not ac-

tually moved for an injunction, his Lordship held that they might reserve that relief till the hearing of the cause, if they thought proper, as it was incident to their estate, and they were entitled to an account for such waste.

Now, the case of *Garth v. Cotton* differs materially from *Jesus College v. Bloome*: because, in the latter, there was clearly a remedy at law by trover; in the former, there was no remedy at law, and unless an account had been granted, a great wrong would have been done to the plaintiff, and he would have been without remedy.

The view taken by Lord Hardwicke, in *Jesus College v. Bloome*, has been recognized in many later cases. See *Pulteney v. Warren*, 6 Ves. 89; *Grieson v. Eyre*, 9 Ves. 346; *Richards v. Noble*, 3 Mer. 673.

In *Lee v. Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. jun. 78, Lord Thurlow, indeed, acted contrary to the doctrine laid down by Lord Hardwicke in *Jesus College v. Bloome*; for, admitting that trover would lie at law [*621] for the timber felled by the tenant for life, *who was still in possession, yet he granted the account, although an injunction was not prayed. "I have no doubt," said his Lordship, "an action of trover might be maintained. What I meant when the cause came on before was this:—Suppose they come for a discovery and an account, and that a discovery is made accordingly, I should agree that the plaintiffs ought to be satisfied with it; but the admission that some has been wrongfully cut, gives them a right to an account of that. . . . My present opinion is, that if any timber has been cut from the estate, where there was no right to cut any, that circumstance gives a right to the account. If you can make out that the plaintiff has no right to come here, but ought to be left to law, I will turn round her bill, because she has not brought an action; but I thought the circumstance of timber having been wrongfully cut down, entitled her to the account, as in the case of a bailiff—if a man enters upon another's lands, and makes money of his property, he will be considered as a bailiff, and must account.

Where mines are opened, an account, it seems, will in all cases be granted, although no injunction is asked: *Bishop of Winchester v. Knight*, 4 P. Wms. 406; and in *Jesus College v. Bloome*, Amb. 55, Lord Hardwicke says, "The Court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade."

In *Parrot v. Palmer*, 3 My. & K. 632, where it was argued that, as there could be no injunction, there could be no account, Lord Brougham entered into an elaborate examination of the authorities. "It may be laid down generally," observed his Lordship, "that, unless in the case of mines, the rule is, no injunction—no account. In *Jesus College v. Bloome*, 3 Atk. 262, where an account was prayed of timber cut by a tenant before the assignment of his lease, and the term being gone, no injunction could be had, the Court held, that no account lay; and so it was decided, though the Court said obiter, that mines formed an excepted case, being in the nature of a trade or business. In *Whitfield v. Bewit*, 2 P. Wms. 240, where an account of timber cut, and an injunction against opening mines, were prayed, the Court appears to have given the account only as incident to a discovery. Indeed, in *Sayer v. Pierce*,

1 Ves. 232, which was a case of mines, but where no possession had been shown by the plaintiff, Lord Hardwicke would only entertain the suit in respect of the confusion of boundaries, and he retained the cause for a year, with liberty to bring ejectment. In *Garth v. Cotton*, Lord Hardwicke takes a somewhat different view of his own judgment in *Jesus College v. Bloome*, from that which the report *of the case gives, but he does not over-throw its doctrine; for he takes the broad distinction, that in the one case there was a legal remedy, and in the other no remedy at all. But it is certain, that if *Lee v. Alston* be law, the distinction formerly taken, particularly in *Jesus College v. Bloome*, is shaken, if not overthrown, and a principle established—that wherever timber is cut on the estate by one not having right, account will lie, because, to use Lord Thurlow's expression, the wrongdoer may be treated as a bailiff. And yet Lord Thurlow assumes throughout, that there is all the while a remedy at law. It must, however, greatly detract from the weight of a doctrine so decidedly opposed to the distinct and sensible opinion of Lord Hardwicke, in *Jesus College v. Bloome*, that, neither in the two reports of Lord Thurlow's judgment, when the case was last before the Court, (3 Bro. C. C. 37, and 1 Ves. jun. 78,) nor in the year 1779, (1 Bro. C. C. 194,) when it was formerly heard, is there the least mention made of that celebrated case, nor, indeed, of *Sayer v. Pierce*." [622]

It is, however, clear, that, in cases of equitable waste, an account will be granted without an injunction. See *Duke of Leeds v. Earl of Amherst*, 14 Sim. 357, 367; S. C., 2 Ph. 117, and cases there cited.

Upon the whole, we may conclude, that, in the case of timber, where there is a remedy *at law* for waste, an account will not be granted, except as incident to an injunction. Where, as in *Garth v. Cotton*, the remedy lies solely *in equity*, an account will be granted, although there is no injunction. But with regard to waste in mines, although there may be a remedy at law, an account will be granted independent of an injunction.

In an action of trover, a person will obtain the value of the timber; in equity he must take the account as it lies, unless there is some special case to vary the terms of it: *Lee v. Alston*, 1 Ves. jun. 82.

Where by act of God, as a tempest, or by act of man as by a trespasser, or by waste of tenants, things are severed from the inheritance, [while a tenant for life impeachable for waste is in possession,] whether they are materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance in esse, whether in fee, or tail, (*Uvedall v. Uvedall*, 2 Roll. Ab. 119,) even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste. *Pigot v. Bullock*, 1 Ves. jun. 484.

Where a tenant for life who has committed waste owns the first existent estate of inheritance, subject to intermediate contingent remainders, he will not be allowed to claim the benefit of the timber, as that would enable him to take advantage of his own wrong. **Williams v. The Duke of Bolton*, 3 P. Wms. 268, n.; *Powlett v. The Duchess of Bolton*, 3 Ves. 374; *Marquis of Ormond v. Kynnersley*, 7 L. J. O. S. (Ch.) 150, 154, 155. [*623]

It has, indeed, been laid down by Sir John Romilly, M. R., that "where by act of God a large quantity of timber is blown down by a storm, the produce is to be laid out in the purchase of stock, and the interest of the fund is to be paid to the successive tenants for life," 15 Beav. 7, but this seems to be opposed to the older authorities.

It may here be noticed that it has been held, as between tenant for life and remainderman, that the thinnings of fir trees under twenty years of age belong to the tenant for life: *Pidgeley v. Rawling*, 2 Coll. 275.

Where tenant for life impeachable for waste, is in possession, the Court will order trees in a state of decay, or which will not improve by standing, or the standing of which is injurious to the others, to be felled, upon the ground, that the interest of the succession requires it, and will direct the interest of the proceeds to be paid to the tenant for life, though impeachable for waste; (see *Tooker v. Annesley*, 5 Sim. 235, and cases there cited; *Tollemache v. Tollemache*, 1 Hare, 456; *Ferrand v. Wilson*, 4 Hare, 381;) and the capital to be transferred to the first owner of the inheritance, or the first tenant for life without impeachment of waste: *Waldo v. Waldo*, 12 Sim. 107; *Philips v. Barlow*, 14 Sim. 263.

If a tenant for life unimpeachable for waste, (*Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759; *Marquis of Ormond v. Kynnersley*, or *Butler v. Kynnersley*, 7 L. J. O. S. (Ch.) 150; 8 L. J. O. S. (Ch.) 67; *Wellesley v. Wellesley*, 6 Sim. 497; *Lushington v. Boldero*, 15 Beav. 1,) or his assignees in bankruptcy, (*Lushington v. Boldero*, 15 Beav. 1,) should fell ornamental timber, the proceeds will belong to the person having the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the timber so cut, to have such proceeds invested upon the same trusts with the lands.

In a recent case, however, the Court refused to allow a fund arising from equitable waste to be paid to a son of a tenant for life in remainder, who, subject to the death of the first tenant for life, without issue, and the life interest of his father, was entitled to the inheritance as tenant in tail. The grounds for this decision appear to have been that the point in the cause could not be decided in the absence of any of the parties interested, and as it could not be said, that the issue of the first tenant for life had no possible interest in the fund during the life of the first tenant for life, the case was not ripe for decision: *Lushington v. Boldero*, 13 Beav. 418.

[*624] *But if the Court were to order ornamental timber to be cut, as for instance, if in consequence of its proximity to a house, it causes it to be unhealthy, it is presumed that by analogy to the cases where ordinary timber is felled by the order of the Court, the Court would direct the interest to be paid to each tenant for life in succession, and the capital to the first owner of the inheritance, or the first tenant for life without impeachment of waste.

Where an account of equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported upon the general principle that where a wrong has been com-

mitted, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of the damage: *The Duke of Leeds v. The Earl of Amherst*, 20 Beav. 239.

As to acquiescence in waste, see *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117.

The old action by writ of waste, which had fallen into disuse, was at length abolished by 3 & 4 Will. 4, c. 27, s. 36.

It is a general principle, that a bill to restrain the commission of waste will be sustained, wherever an action of waste will lie at common law: "The remedy by injunction," says Chancellor Kent, "is applicable to every species of waste, it being to prevent a known and certain injury;" *Hawley v. Clowes*, 2 Johnson's Ch. 122; *Duvall v. Waters*, 1 Bland, 569, 576. But the chancery remedy will be given in many cases, where an action of waste at law would not lie: see the general outlines of equitable relief on this subject, traced in *Duvall v. Waters*, 1 Bland, 576; *Lyon et al. v. Hunt et al.*, 11 Alabama, 295, 305; *Attaquin and others v. Fish*, 5 Metcalf, 140, 147, 148; *Smith v. The City Council*, 19 Georgia, 89; *Hare v. Hare*, 2 Halsted's Chancery, 117. "There are numerous cases in chancery, as Lord Hardwicke has frequently observed," says Kent, C., "in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee; the mesne remainderman cannot bring waste, nor the remainderman in fee, but chancery will interpose and stay waste. So equity will, in many cases, restrain waste, though the lease contain the clause, *without impeachment of waste*, and which takes away the

remedy at law, as where this power is exercised in an unreasonable manner and against conscience," *Kane v. Vanderburgh*, 1 Johnson's Chancery, 11, 12. See also *Kidd v. Dennison*, 6 Barbour's S. Ct. 10, 15.

A threat to commit waste, is a sufficient ground for an injunction, though no waste has actually been committed; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 197; *Duvall v. Waters*, 1 Bland, 559, 576; *The Canal Company v. Comegys*, 2 Carter, 469; *Rodgers v. Rodgers*, 11 Barbour, 595.

A bill for waste will lie against an under-lessee by the paramount landlord; *Sarles v. Sarles*, 3 Sanford, 601. See *Ingraham v. Dunnell and others*, 5 Metcalf, 118; *Atkins v. Chilson and others*, 7 Id. 398. It will lie, also, between tenants in common, where the waste is not necessary to the enjoyment of the estate, and is greatly prejudicial to the interests of the co-tenant, and especially where a bill is filed for a partition; *Hawley v. Clowes*, 2 Johnson's Chancery, 122; *Administrators of Johnson v. Executors of Johnson*, 2 Hill's Chancery, 277, 295.

Where there is an executory devise over, the owner of the contingent fee upon which it is limited, or of any other estate previous to it, may be restrained from the commission of waste; *Wallington v. Taylor*, Saxton's Chan-

cery, 314, 318; *Brashear, &c. v. Macey, &c.*, 3 J. Marshall, 89, 92.

A bill may be sustained by a mortgagor against a mortgagee in possession, to restrain the commission of acts wilfully done to the destruction or detriment of the estate, because the land is only a security to the mortgagee, and for other purposes is considered in chancery as being the property of the mortgagor; *Irwin v. Davison*, 3 Iredell's Equity, 311, 321; *Rawlings v. Stewart*, 1 Bland, 22; *Downing, &c. v. Palmateer*, 1 Monroe, 64; *Youle et ux. v. Richards et al.*, Saxton, 535, 538; *Smith v. Moore*, 11 New Hampshire, 55, 62. The same relief may be had by a mortgagee against the mortgagor in possession, to prevent the commission of any waste which may impair the mortgage security; *Brady v. Waldron*, 2 Johnson's Chancery, 148; *Robinson v. Preswick*, 3 Edwards, 246; *Salmon v. Clagett*, 3 Bland, 126, 180; *Brown v. Stewart*, 1 Maryland Chancery, 87; *Phoenix v. Church*, 2 Halsted's Ch. 447.

In like manner, in Connecticut, after land of an insolvent debtor has been attached for a debt, in a suit at law, an injunction to restrain him from waste will be granted by a court of chancery; *Camp v. Bates*, 11 Connecticut, 51; and in New York, after a sale of land on execution, during the time allowed by statute for redemption, an injunction will lie at the suit of the purchaser to restrain the defendant from committing waste; *Boyd v. Hoyt*, 5 Paige, 65; *Bank of Utica v. Messereau*, 7 Id. 517.

It has been stated to be a general rule, that an application for an injunction to restrain waste, ought to show a good title to the land, and that a

doubtful title, or a title wholly denied, will not be sufficient: see *Storm v. Mann*, 4 Johnson's Chancery, 21; *Hough v. Martin et al.*, 2 Devereux & Battle's Equity, 379, 385; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 198. But in several of the states, the distinction is now established, between a contested title upon which a suit at law is pending, and one upon which no such suit has been brought. Where an ejectment, or other action at law, to try the title, has been brought, a court of equity will restrain the commission of waste by the party in possession, till the trial and determination of the right, or till the recovery of possession, where irreparable mischief might be effected before relief could be had at law, or, under other special circumstances; *Shubrick v. Guerard*, Dessausure, 616, 619; *Kinsler v. Clarke*, 2 Hill's Chancery, 617, 618; *Duwall v. Waters*, 1 Bland, 569, 577; *Harris v. Thomas*, 1 Henning & Munford, 18; and the same course may be adopted where the conveyance, under which the defendant claims, has been obtained from the plaintiff by fraud, or undue influence; *Staats v. Freeman*, 2 Halsted, Chancery, 490. When, however, the bill shows that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, or the defendant in his answer, positively denies the plaintiff's title, and no suit at law has been brought, an injunction will not be granted; *Stewart v. Chew*, 3 Bland, 440. See also *Attaquin and others v. Fish*, 5 Metcalf, 140, 148. But it seems that an injunction may be granted when the defendant in a suit instituted to enforce an equitable right or title, abuses the power given him by possession, and

commits acts of a nature to produce mischief, which is irreparable, and does not admit of compensation; *Green v. Keen*, 4 Maryland, 98. It may also be stated, as a general principle, that the dissolution or refusal of an injunction, is a matter of discretion, and will not necessarily follow from a denial of the complainant's title, when the injury to him would be irreparable, or when the purposes of justice will, in the opinion of the court, be promoted by an opposite course; *Poor v. Charleton*, 3 Sumner, 70; *post*, vol. 2, note to *The Earl of Oxford's case*.

Formerly, it was a fixed rule, that an injunction to restrain waste could be granted only where there was an acknowledged privity of title or contract, and not where the injury was a mere trespass, and there was a legal remedy for it. Lord Thurlow and Lord Eldon, however, established the practice of granting injunctions for trespass in special cases, where irreparable mischief might ensue. It is now settled, that acts of trespass will be restrained where the damage is great and irreparable, or by constant repetition is calculated to do lasting injury to the inheritance; but still there must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or to prevent multiplicity of suits, or where the value of the inheritance is put in jeopardy; and equity will not interfere where adequate and convenient satisfaction can be had by damages at law; *Stevens v. Peekman*, 1 Johnson's Chancery, 318; *Livingston v. Livingston*, 6 Id. 497; *Jerome v. Ross*, 7 Id. 315, 332; *Duvall v. Waters*, 1 Bland, 569, 577; *The Georgia Creek Co. v. Detwold*, 1

Maryland Ch. 371; *Southard et ux. v. The Morris Canal*, Saxton, 519, 521; *Attaquin and others v. Fish*, 5 Metcalf, 140, 147; *Lyon et al. v. Hunt et al.*, 11 Alabama, 295, 306; *Smith v. Pettingill et al.*, 15 Vermont, 82. For ordinary trespass, where the remedy at law is adequate, and there is no case made out of irreparable mischief, an injunction will not be granted; *Cooper v. Hamilton*, 8 Blackford, 377.

Where an injunction against waste is granted, if the complainant has a claim in law to satisfaction for the value of the timber or other matters, the removal of which constitutes the waste, he is entitled, as of course, to an account, as incident to the injunction and to prevent multiplicity of suits; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 198; *Livingston v. Reynolds*, 26 Wendell, 115; *Sarles v. Sarles*, 3 Sandford, 601; *Lefforge v. West*, 2 Carter, 514; *Rodgers v. Rodgers*, 11 Barbour, 599; *Ware v. Ware*, 2 Halsted, Ch. 117. But an account is not a necessary consequence of an injunction, and will not be allowed, except where the complainant has the immediate property in the matter which is severed from the freehold; and there are many cases in which an injunction to prevent waste will be granted for the protection and security of the complainant, and yet no damages and no account will be due to him: see *Duvall v. Waters*, 1 Bland, 569, 576; *Downing, &c. v. Palmateer*, 1 Monroe, 64; *Lefforge v. West*. An intermediate tenant for life may have an injunction to prevent those acts by a tenant for years, or a previous tenant for life, which are immediately injurious to his estate, but he cannot recover for the waste, because that

enures to him who has the inheritance; *Mayo v. Feaster*, 2 M'Cord's Chancery, 137, 143.

But an account for waste committed, is only consequential upon an injunction, or upon some other matter of original jurisdiction; it is not in itself a substantive ground of equitable relief, as the remedy at law is adequate. "This court," said the chancellor, in *Winship v. Pitts*, 3 Paige, 259, 261, "only interferes to prevent future waste; except in cases where the complainant has no remedy at law, or a discovery is necessary, or where there is some other ground for equitable interference. In ordinary cases, the account for waste already committed, is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits." The rule, however, is general, that although the recovery of damages for waste is not a substantive ground for a bill in equity, yet, if the court has jurisdiction of the subject, upon any other ground, it will decree an account of the waste committed. Thus, upon a bill for partition, against a co-tenant who has been in possession for a long time, an account of rents and profits may be ordered, and if the land has deteriorated in value by his treatment of it, he may be made accountable for it as for waste. "Having proper jurisdiction of the case," said the court, "there is hardly any question in relation to property, which this court may not determine incidentally for the purpose of doing complete justice, and preventing multiplicity of litigation. The rule is laid down in the case of *Jesus College v. Bloome*, 3 Atk. 262,

Amb. 54, that a bill will not lie for waste merely; but if the party be properly in court for another purpose, as to obtain an injunction, then an account of past waste will be granted. The principle is very fully illustrated in the reasoning of the case. There are many cases in which an account has been allowed of the produce of mines; and the opening of mines is waste." *Backler v. Farrow*, 2 Hill's Chancery, 111.

In like manner, ordinarily an injunction will not be granted to prevent the removal of timber already cut, even where an injunction against cutting timber in future is granted. The relief will be confined to the protection of the timber growing, unless in extraordinary cases; *Van Wyck v. Alliger*, 6 Barbour's S. Ct. 507, 514; *Johnson v. White*, 11 Id. 194. In *Watson v. Hunter*, 5 Johnson's Chancery, 169, a lessor filed a bill against his lessee for years, who had been committing great waste in timber, praying for an injunction to restrain the defendant from cutting down any more timber, and from removing that already cut down, and not sawed, and that which was converted into boards or planks. "Injunctions to the extent prayed for may have been granted," said Chancellor Kent; "but as I am not satisfied as to the propriety of such extensive and summary interference, I have been led to look into the course of the English authorities and practice on the point. After timber is cut, it ceases to be part of the realty, and is converted into personal property, and trover will lie for it. The question is, whether this court ought to interfere, in the first instance, to control the disposition of that personal

property; and that too, without any special or extraordinary necessity stated for such interference.

“The practice of granting injunctions, in cases of waste, is to prevent or stay the *future* commission of waste; and the remedy for waste already committed, is merely *incidental* to the jurisdiction in the other case, assumed to prevent the multiplicity of suits, and to save the party the necessity of resorting to trover at law. Thus in the case of *Jesus College v. Bloome*, (3 Atk. 262, Ambl. 54,) a bill was filed for an account and satisfaction for waste in cutting down trees, and no injunction was prayed for, and the tenants’ estate had been assigned and determined. Lord Hardwicke held that the bill was improper, and would not lie merely for satisfaction for timber cut down, and that an action of trover was the remedy. Where the bill was for an injunction to prevent waste, and for waste already committed, the court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. The ground for coming into chancery, was to stay waste, and not for satisfaction of the damages, as the commission of waste was a tort, and the remedy lay at law. But to prevent multiplicity of suits, the court, on bills of injunction to stay waste, and where waste had already been committed, would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to another action at law. The bill, in that case, was, consequently, dismissed. In the subsequent case of *Smith v. Cooke*, (3 Atk. 381,) Lord Hardwicke observed, that if the estate of the lessee

was determined, and he had quit, a party could not come into equity, merely for an account of timber cut wrongfully; but where he continued in possession, and in a condition to commit more waste, the party might come into equity to stay future waste, and also be entitled to an account for the waste committed. So, again in the case of *Lee v. Alston*, (1 Vesey, Jr., 78,) the same doctrine was declared by Lord Thurlow. A bill was filed by a remainderman in fee against a tenant for life, for an account of timber cut, and for an injunction. The answer admitted the cutting of the timber wrongfully, as charged, and an account was decreed. It was observed, that the plaintiff, on the discovery by the answer, might have resorted to trover at law, but he was not obliged to do so, and might have an account under the admission in the answer. The chancellor referred to the case of *Whitfield v. Bewitt*, (2 P. Wms. 240,) which was a bill for an injunction to stay waste, and for an account of timber cut, and in which it seemed to be held, that the right to the timber cut might be pursued in chancery, as well as by trover at law.

“The same doctrine was declared by Lord Hardwicke, in *Garth v. Cotton*, (1 Vesey, 528,) and that the decree for an account of the waste already committed, was ‘an incident’ to the injunction to stay waste. It would seem, then, to be a stretch of jurisdiction, to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this court much beyond the remedy at law; and if it had been the established English practice,

we should not have been without the most clear and explicit cases in proof of it. The recovery in this court is not the timber itself, *in specie*, but damages for the value of it; and why should the personal chattel be bound by injunction in this case, more than in any other case, where the remedy is for a *tort* sounding in damages? This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste, already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law.

"In the case of *The Bishop of London v. Webb*, (1 P. Wms. 527,) an injunction was called for against a lessee for years, to prevent digging the ground for brick, as it was destroying the field and carrying away the soil. The Lord Chancellor said, 'let the defendant carry off the brick he has dug, but be enjoined from further digging.' In *Packington's case*, (3 Atk. 213,) the bill stated, that the defendant had cut down a great number of trees, and had threatened to cut down and destroy them all, but the injunction only went to restrain him 'from cutting down timber trees growing.'

"The only case I have met with applicable to the very point, is a very loose note of an *anonymous* case of 1 Vesey, Jr., 93, in which the solicitor-general moved for an order to prevent the removal of timber wrongfully cut down. In what stage of the cause, or upon what state of pleadings and proofs, this motion was made, does not appear. Lord Thurlow is said to have observed, 'I have no doubt about the interference of this court to prevent waste. The only difficulty I have, is, as to what shall be done with the timber cut. Trover might be brought for it; but, as the Register says, many orders of this kind have been made, take the order.'

"Such a case is not a sufficient authority to extend the injunction to timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under the shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say, that the court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process." See, also, *Kidd v. Dennison*, 6 Barbour's S. Ct. 10, 18.

In accordance with the principles indicated in the case of *Watson v. Hunter*, it has since been determined, that where a bill is filed to prevent future waste, and also to prevent the

removal of timber already cut, or have an account of waste already committed, the court, to avoid multiplicity of suits, will allow an account and satisfaction for what has been done, and if the defendant is insolvent, and the

mischief would therefore be irreparable, will grant an injunction against removing or disposing of timber already cut on the premises: *Spear v. Cutter*, 5 Barbour's S. Ct. 487, 489.

STATUTE OF FRAUDS.—PART PERFORMANCE.

*LESTER [OR LYSTER] v. FOXCROFT AND OTHERS. [*625]

APRIL 7, 1701.

REPORTED 1 COLES'S P. C. 108.¹

PART PERFORMANCE OF A PAROL CONTRACT RESPECTING LAND.]—*Specific performance of a parol agreement to grant a lease decreed, notwithstanding the Statute of Frauds, after acts of part-performance on the part of the lessee by pulling down an old house, and building new houses according to the terms of the agreement.*

THE appellant stated, that Isaac Foxcroft was seised in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles's-in-the-Fields, in the county of Middlesex, and possessed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th March, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was *particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and 150*l.* yearly rent for the last ninety-eight years.*

At the time of making such agreement, *there was no memorandum or note thereof in writing; but in performance of the agreement, appellant entered into that part of the messuage, and, at his own cost, pulled down the same, and built several new houses thereon, (the whole fourteen *being [*626] almost finished,) and therein disbursed several thousand pounds—* about 2000*l.* his own money—and several sums borrowed from Foxcroft upon his own securities, yet unsatisfied, and was all along in possession, and acted

¹ S. C., cited 2 Vern., 456, nom. Foxcraft v. Lister; Gilb. Rep. 4; Prec. Ch. 519, 526, nom. Leicester v. Foxcroft.

as sole proprietor and owner, and was acknowledged as such by Foxcroft, who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof.

About August, 1698, Foxcroft (being then ill of the sickness whereof he died,) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft, his daughter Elizabeth, and Benjamin Whichcott, and appointed Francis Nicholson guardian of his son Isaac, with power to let and set for such time during his minority. And immediately after making the said will, he delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant's lease drawn by; and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to Foxcroft to be executed, who caused both of them to be read to him, and approved of the same; but observed that there was a mistake in one part thereof in his name, John being put for Isaac, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute them; [*627] and often expressed his dissatisfaction *that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done.

And appellant, a few days before the death of Foxcroft, brought the deeds, so amended, to his house, to have them so executed as he had directed, but respondent refused to let appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death, respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary Term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard, 6th March, 1700, the Lord Keeper¹ declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; *which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been, at appellant's great expense, so far executed on his part, there ought to be a reciprocal performance of it on the other part; and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the*

¹ Sir Nathan Wright.

lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them.

The respondents, in affirmance of the decree, alleged, that Isaac Foxcroft made his will, dated 30th August, 1698, of the import stated by appellant, and died 15th September following; and, in Hilary Term then next, appellant filed his bill against respondents for a specific execution of a parol agreement expended; and that respondents had answered, that they knew not that appellant was any ways concerned in pulling down and rebuilding the premises, otherwise than as agent or servant for the testator, at whose proper charge and expense they insisted the work was done; and denied that any such agreement for a lease was ever made by the testator to the appellant; *and showed that the appellant was greatly indebted to the testator before any building began, and that the testator had no other way to [*628] obtain his debt but by employing him in work; and that the testator, though of perfect understanding, had not taken any notice of such supposed agreement in his will; and that the appellant had not required a performance thereof, for near three years and a half after, nor until so near an approach of the testator's death; and showed, further, that three of the appellant's witnesses were considerable legatees in the testator's will, and that their evidence tended to enlarge the personal estate for their own benefit; and finally, insisted, that nothing of such pretended agreement being in writing, and signed by either of the parties, the statute made for preventing frauds and perjuries was a full bar to the appellant's pretences.

Die Lunæ, 7° Aprilis, 1701. Upon hearing counsel on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismissal complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the respondents to whom the estate in question should come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, &c., such a lease of the premises in question, as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the mean time, hold and enjoy the same, under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. xvi., p. 644.

“The Statute of Frauds,” observes Lord Redesdale, “says, that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against *conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The [*629] first case (apparently) of this kind was *Foxcroft v. Lyster*, cited 2 Vern. 456, and reported in Colles's Parl. Cas. 108. That case was decided on a principle acted upon in courts of law, though not applicable by the modes of

proceeding in a court of law to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement, to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law, fraud destroys rights. If I mix my corn with another's, he takes all; but, if I induce another to mix his corn with mine, I cannot then insist on having the whole. The law in that case does not give me his corn. The case of *Foxcraft v. Lyster*, therefore, I conceive, was decided on clear principle; though, whether the cases founded on that case have been all so well considered, I will not take upon me to say. But it appears, from these cases, that courts of equity have decided on equitable grounds, in contradiction to the positive enactment of the Statute of Frauds, though their proceedings are in words included in it:" *Bond v. Hopkins*, 1 S. & L. 433. See also *Clinan v. Cooke*, 1 S. & L. 41; *Duke of Leeds v. The Earl of Amherst*, 20 Beav. 239.

Acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, putting a deed into a solicitor's hands to prepare a conveyance, employing surveyors to value timber on an estate, or fixing upon persons as appraisers to value stock, appointing a person to make a valuation of the land, registering deeds, and similar acts of an equivocal nature, are not sufficient acts of part performance to take a parol contract out of the statute: *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Swanst. 437, n.; *Clerk v. Wright*, 1 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Cooke v. Tombs*, 2 Anst. 420; *Cooth v. Jackson*, 6 Ves. 17, 41; *Stokes v. Moore*, 1 Cox, 219; *Frame v. Dawson*, 14 Ves. 386.

Payment of part of the consideration money is not an act of part performance so as to take a contract out of the Statute of Frauds. See *Clinan v. Cooke*, 1 S. & L. 40; where it seems that the only circumstance that could be urged as an act of part performance, was the payment of the sum of fifty guineas to Mr. Cooke; but Lord Redesdale held it not to be an act of part performance. "It has always," observed his Lordship, *"[*630] been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood v. Meale*, Prec. Ch. 560, is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly, that that was of no consequence, in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally, for it is paid in both cases as part payment, and no distinction can be drawn; but the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said (sect. 13,) that in another case, viz. with respect to goods, it shall operate as part performance. And the courts have, therefore, considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant, that it should not bind in the case of lands."

And see *O'Herlihy v. Hedges*, 1 S. & L. 123. However, notwithstanding what is said by Lord Redesdale, a contrary doctrine seems at one time to have prevailed. (See the cases cited in the note to *Olinan v. Cooke*, 1 S. & L. 40.) But Lord Redesdale's doctrine is now universally adopted, and it has even been recently laid down that the payment of *all* the purchase-money will not be considered an act of part performance to take a parol contract out of the Statute of Frauds. *Hughes v. Morris*, 2 De Gex, Mac. & G. 356.

But admission into possession having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure: (*Morphett v. Jones*, 1 Swanst. 181; *Borrett v. Gomeserra*, Bunb. 94; *Earl of Aylesford's case*, 2 Stra. 783; *Lacon v. Mertins*, 3 Atk. 1; *Wells v. Stradling*, 3 Ves. 381; *Bowers v. Cator*, 4 Ves. 91; *Gregory v. Mighell*, 18 Ves. 328; *Kine v. Balfe*, 2 Ball & B. 343;) a fortiori where, as in *Lester v. Foxcroft*, the person seeking specific performance has laid out money in building or in improvements. See *Floyd v. Buckland*, 2 Frem. 268; *Mortimer v. Orchard*, 2 Ves. jun. 243; *Toole v. Medlicott*, 1 Ball & B. 393; *Wheeler v. D'Esterre*, 2 Dow. 359.

But in all these cases, in order to amount to part performance, the acts must be unequivocally referrible to the agreement; and the ground on which courts of equity have allowed such acts to exclude the operation of the statute *is fraud. A party who has permitted another to perform acts on [*631] the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referrible to the contract: *Morphett v. Jones*, 1 Swanst. 181; *Attorney-General v. Day*, 1 Ves. 221; *Walker v. Walker*, 2 Atk. 100; *Buckmaster v. Harrop*, 7 Ves. 346; *Whitbread v. Brochhurst*, 1 Bro. C. C. 417; S. C., 2 V. & B. 154, n.; *Hawkins v. Holmes*, 1 P. Wms. 770; *Wills v. Stradling*, 3 Ves. 378; *Meynell v. Surtees*, 3 Sm. & Giff. 101; *Hollis v. Edwards*, 1 Vern. 159, and Mr. Raithby's note. "I take it," observes Lord Redesdale, "that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if, upon a parol agreement, a man is admitted into possession, he is made a trespasser if there be no agreement. This is put strongly in the case of *Foxcroft v. Lister*: there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrongdoer, and to account for the rents and profits; and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and, if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the

statute; and I take it, therefore, that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcraft v. Lister*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent:" *Clinan v. Cooke*, 1 S. & L. 41.

Moreover, it is essential that possession should be delivered according to the contract, and not obtained wrongfully, otherwise it will not be considered as an act of part performance. Thus, in *Cole v. White*, before Lord Camden, in 1767, (cited 1 Bro. C. C. 409,) where there was an agreement for a lease for four years, and the bill charged that possession was given, the defendant pleaded the statute, and by his answer *denied that possession was delivered in part performance, and swore that the plaintiff obtained it wrongfully*. The [*632] plea *was allowed, and Lord Camden added that the giving instructions for a lease could not make part of the case as a part performance.

Where subsequently to the institution of a suit for specific performance of a parol agreement, upon the ground of part performance, the plaintiff has obtained by Act of Parliament the means of quieting his possession, without further assistance, from a court of equity, inasmuch as the jurisdiction in cases of specific performance is discretionary, his right to a decree will be materially affected where it depends on the principle of protecting the possession. *Meynell v. Surtees*, 3 Sm. & Giff. 101, 116.

As between landlord and tenant, it is to be observed that the mere *continuance* in possession by the tenant is not alone of itself an act of part performance of a parol agreement. In *Wills v. Stradling*, 3 Ves. 381, Lord Loughborough, C., observes, "As to the possession in the case of a tenant, who of course continues in possession unless he has notice to quit, the mere fact of his continuance in possession, (for quo animo he continued in possession,) would not weigh. The delivery of possession by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but the mere holding over by the tenant, which he will do, of course, if he has no notice to quit, would not of itself take the case out of the statute, or even call for an answer." See, also, *Smith v. Turner*, Prec. Ch. 561; *Savage v. Carroll*, 1 Ball & B. 265; *Morphett v. Jones*, 1 Swanst. 181. But in a case where there was a payment of an increased rent referrible to the agreement, Lord Loughborough ordered the plea of the Statute of Frauds to stand for an answer, with liberty to except. "Payment of additional rent," he observed, "per se, is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon

this plea, is not equivocal at all. It is incumbent upon the defendant to say, whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence, it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood v. The Duke of Bedford*, (1 Atk. 497,) which finally turned upon the want of authority in the steward, is an authority upon which, under the circumstances alleged in this bill, the benefit of the plea ought to be saved to the hearing:” *Wills v. Stradling*, 3 Ves. 378; and see **Lord Desart v. Goddard*, 1 Wallis, Rep. by Lyne, 347. [*633]

The laying out of money by the tenant continuing in possession, if it was part of the contract that money should be laid out, and it is one of the considerations for granting the lease, (the laying out of which must be then with the privity of the landlord,) it is very strong to take it out of the statute,—per Lord Loughborough, C., in *Wills v. Stradling*, 3 Ves. 382. In *Mundy v. Jolliffe*, 5 My. & Cr. 167, a tenant from year to year of a farm having, at his own expense, drained the lands upon the farm, and laid down into pasture the only piece of arable land which the farm contained, and repaired the buildings, pursuant to a parol agreement for a lease, Lord Cottenham, C., (overruling the decision of Sir L. Shadwell, V. C., reported 9 Sim. 413,) upon proof of the agreement decreed specific performance saying, there was no doubt of the part performance. In the case of *Sutherland v. Briggs*, (1 Hare, 26,) the plaintiff was lessee of a house and other premises for a term of thirty-one years, at a rent of £60, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of £9. The lessor of the house became the purchaser of the meadow, and, by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises; the plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum which the lessor drew up, whereby he agreed to pay an entire rent of £80 a year for the consolidated property. It was held, by Sir James Wigram, V. C., that the extension of the house into the meadow, by the plaintiff, with the concurrence of his landlord, was evidence of, and was a sufficient consideration for, a contract to demise the meadow; that the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon; that the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises; and that the doctrine with regard to the mutuality of contracts had no application to such a case. “The first point,” observed his Honor, “suggested rather than pressed, was, that, the plaintiff being in possession of the meadow as tenant from year to year, the

[*634] expenditure upon the property did not unequivocally *show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly, it is in general, necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred: *Morphett v. Jones*, 1 Swanst. 172. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient, (1 Sugd. V. & P., p. 20, 10th ed. ;) and if the case of *Mundy v. Jolliffe*, (5 My. & Cr. 167,) in which Lord Cottenham differed from the Vice-Chancellor of England, may be considered as correctly illustrating the rule of this Court as to the acts of part performance which will take a case out of the statute, the alterations of the garden-fence and making the plantation in the meadow, would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the Court decreed Mr. Jolliffe to grant him a lease, upon the promise of which it was said the expense of draining had been incurred.

"It was next said, that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion, that justice would be satisfied by doing this, I cannot accede ; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this Court, however, will not permit me so to consider the case. If the acts done by the plaintiff are to be considered acts of part performance, taking the case out of the operation of the statute, the rules of the Court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement, namely, the meadow, and not that part of it only upon which the house stands. The case of *Mundy v. Jolliffe*, will apply also to this part of the present case." See, however, *Frame v. Dawson*, 14 Ves. 386.

In *Parker v. Smith*, (1 Coll. 608,) the landlord of a coal set, having four tenants in partnership together holding under a lease, several years of which were unexpired, entered into a parol agreement with all four upon the surrender of the old lease to grant a new one to two of the partners,—the plaintiffs,—upon the terms that the partnership should be dissolved, and that the plaintiffs should release the two retiring partners from all liability. The dissolution and *release so agreed upon took place, by which the plaintiffs [*635] took upon themselves the liability which had before been shared by the four. Sir J. L. K. Bruce, V. C., decreed specific performance of the agreement. "It is," said his Honor, "part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise, than as acts of part performance, taking the case out of the Statute of Frauds.

Although there have been acts of part performance, the terms of the contract must be certain and unambiguous: *Clinan v. Cooke*, 1 S. & L. 22;

Boardman v. Mostyn, 6 Ves. 467, 470; *Symondson v. Tweed*, Prec. Ch. 374; *Foster v. Hale*, 3 Ves. 712, 713; *Savage v. Carroll*, 1 Ball & B. 265, 551; S. C., 2 Ball & B. 451; *Tooke v. Medlicott*, 1 Ball & B. 404; *Lindsay v. Linch*, 2 S. & L. 1; *Reynolds v. Waring*, 1 You. 346.

Where the evidence of the parties as to the terms of the contract is in some respects contradictory, specific performance will be decreed, if the Court, by directing inquiries can collect what were the terms about which the parties differ. Thus, in *Mortimer v. Orchard*, 2 Ves. jun. 243, where the plaintiff had built a house, his witness proved an agreement different from that set up by the bill, and the answers stated an agreement different from both. Lord Loughborough, C., said, that, in strictness, the bill ought to be dismissed, but, on account of the expenditure, decreed specific performance, according to the agreements admitted by the answers.

So, likewise, "in a case that came from Malton, in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow thought proper to send it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty there, was in ascertaining that. The Master decided as well as he could; and then the cause came before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made—per Lord Eldon, in *Boardman v. Mostyn*, 6 Ves. 470, in which case his Lordship also observed, "that, if it was *res integra*, the soundest rule would be, that, if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced." See, also, *Mundy v. Jolliffe*, 5 My. & Cr. 177, in which case Lord Cottenham says, "courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing *the great [*636] injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted, in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were."

It must be always borne in mind, "that part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement." Per Lord Brougham in *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 158.

Although it is clear that where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part performance so as to take the case out of the Statute of Frauds, inasmuch as the statute ex-

pressly provides that a contract in consideration of marriage shall not be binding unless it be in writing. (*Dundas v. Dutens*, 1 Ves. Jun. 196; *Lassence v. Tierney*, 1 Mac. & G. 551; *Warden v. Jones*, 26 L. J. N. S., Ch. 427;) nevertheless a parol contract may be taken out of the statute by acts of part performance independently of the marriage: [*Stoddart v. Tuck*, 5 Maryland, 18.] Thus in *Surcombe v. Pinniger*, 3 De G. M. & G. 571, a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband also expended money upon the property. It was held by the Lords Justices, that there had been sufficient part performance of the parol contract to take the case out of the Statute of Frauds. "In this case," said Lord Justice Turner, "there is a part performance by the delivering up of possession to the husband—a fact which has been always held to change the situations and rights of the parties, and there has been considerable expenditure by him on the property. There is therefore here what was wanting in *Lassence v. Tierney*, viz. acts of part performance, besides the marriage. The difficulty in these cases is, that the Statute of Frauds presents an obstacle [*637] to suing upon the agreement. But it has been *held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute, so does also part performance." See also *Taylor v. Beech*, 1 Ves. 297.

Although a written contract cannot be varied by parol, a court of equity, when there have been acts of part performance of the parol variation, will decree a specific performance of the contract, with the variation. Thus, in the *Anonymous case*, reported 5 Vin. Ab. 522, pl. 38, W. leased a house to N. for eleven years, and was to allow £20 to be laid out in repairs. The agreement was reduced into writing, signed and sealed by both parties. N. repaired the house, and, finding it to take a much greater sum than the £20, told W. of it, and that he would nevertheless, go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen, or as many as N. should think fit. W. replied that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning any term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the Statute of Frauds? The Master of the Rolls said, that, before the statute, written agreements could not be controlled by a parol agreement contrary to it, or altering it; but *this is a new agreement, and the laying out the money is a performance on one part*, and ought to be carried into execution; and built his decree upon these cases—first, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and, after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the Statute of Frauds: the Lord Keeper dismissed the bill, but the plaintiff was relieved in Dom. Proc.;

and the second was a case in Lord Jefferies' time, MS. Rep. Mich., 4 Geo., Canc.

A contract will be taken out of the Statute of Frauds where the provisions of the statute have not been complied with, in consequence of the fraud of the person against whom a decree for specific performance is sought : *Maxwell v. Montacute*, Prec. Ch. 526 ; *Walker v. Walker*, 2 Atk. 98 ; *Joynes v. Statham*, 3 Atk. 389 ; *Whitchurch v. Bevis*, 2 Bro. C. C. 565 ; and, therefore, in the principal case, even had there been no acts of part performance of the agreement, if, as was alleged, the execution of the lease had been prevented by indirect and unfair means, there might have been sufficient grounds for the Court to have decreed a specific performance.

Lord North appears to have thought, although he never *actually [*638] so decided, that, where it was part of the agreement that it should be put into writing, the agreement would be taken out of the Statute of Frauds. See *Hollis v. Whiteing* or *Edwards*, 1 Vern. 151, 159 ; *Leak v. Morrice*, 2 Ch. Ca. 135. But Lord Thurlow, in *Whitchurch v. Bevis*, where this doctrine was urged at the bar, said, " I take that to be a single case, and to have been overruled. If you interpose the *medium of fraud*, by which the agreement is prevented from being put into writing, I agree to it ; otherwise, I take Lord North's doctrine, ' that if it had been laid in the bill that it was part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."

Where a partnership, or an agreement in the nature of a partnership, exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock-in-trade of the partnership ; and, the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether it be of land, or of property of any other nature : *Dale v. Hamilton*, 5 Hare, 369 ; 2 Ph. 266 ; [1 Am. Leading Cases, 4th ed. ;] and see *Darby v. Darby*, 3 Drew. 495.

Parol agreements, although there be no act of part performance, will be taken out of the Statute of Frauds where the person sought to be bound admits the contract. Thus, where a bill has been filed for specific performance of an agreement, though not in writing, nor so stated in the bill, if the defendant, by his answer, admits the agreement stated in the bill, it takes it entirely out of the mischief the statute was designed to obviate ; and, as there would be no danger of perjury, the Court would decree it, and if the defendant should die, upon a bill of revivor against his heir, the principle going throughout, and equally binding the representatives : *The Attorney-General v. Day*, 1 Ves. 221 ; *Lacon v. Mertins*, 3 Atk. 3. However, Lord Bathurst, in *Eyre v. Popham*, Lofft's Rep. 808, 809, thought otherwise.

But, although a parol agreement is admitted by the answer, if the defendant insists upon the Statute of Frauds, it will be a bar to a decree for specific performance : *Moore v. Edwards*, 4 Ves. 23 ; *Cooth v. Jackson*, 6 Ves. 12 ; *Rowe v. Teed*, 15 Ves. 375 ; and *Blagden v. Bradbear*, 12 Ves. 471, where

Sir William Grant, M. R., observes, that it is immaterial what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no [*639] more be thrown upon the defendant *to supply defects in the agreement than to supply the want of an agreement.

Where, however, a defendant by answer admits an agreement, if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the Statute of Frauds, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement, good under the statute, or else that on some other ground it was binding on him: (per Lord Cranworth, C., in *Ridgway v. Wharton*, 3 De G. M. & G. 689.) So in *Skinner v. M'Douall*, 2 De G. & Sm. 265, where a defendant by his answer alleged that no formal note of the agreement charged by the bill was made, and denied that any binding agreement ever existed, but he did not expressly claim the benefit of the Statute of Frauds, it was held by Sir J. L. Knight Bruce, V. C., at the hearing, that he was not entitled to the benefit of the statute.

If a defendant admits and submits to perform a parol agreement, he cannot afterwards, by an answer to the bill when amended, insist upon the statute: *Spurrer v. Fitzgerald*, 6 Ves. 548.

Where a bill does not allege a sufficient agreement within the Statute of Frauds, the objection should be taken by demurrer: *Wood v. Midgley*, 2 Sm. & G. 115; 5 De G. Mac. & G. 41.

In almost every State of this Union, the rule is well settled, that, in equity, part performance takes a parol agreement out of the operation of the Statute of Frauds: see *Parkhurst v. Van Cortland*, 14 Johnson, 15, 31; *Hall and Wife v. Hall et al.*, 1 Gill, 383, 389; *Annan v. Merritt*, 13 Connecticut, 479, 491; *Eaton v. Whitaker*, 18 Id. 222, 229; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 389; *Farrar v. Patton*, 20 Missouri, 81; *Despain v. Carter*, 21 Id. 331; *The School District v. Mectron*, 4 Wisconsin, 79. Estates for years, are within the principle, as well as those of greater duration; and hence, even if a lease were within the clause of the statute which

provides that agreements which cannot be performed in a year, must be in writing, it would be taken out of it by the entry of the lessee, and the payment of rent; *Grant v. Ramsay*, 7 Ohio, N. S. 157. In Tennessee, however, part performance is not allowed to have the effect of taking a case out of the statute; and specific performance is never decreed of a parol contract to convey; *Patton v. M'Clure*, Martin & Yerger, 333; *Ridley et al. v. M'Nairy et als.*, 2 Humphreys, 174. In North Carolina, also, the rule is, that although there has been part performance, as, payment and delivery of possession, yet, if the defendant denies the contract, and insists on the statute, no relief

will be afforded in chancery; if he admits the contract and insists on the statute, the court will order an account, and will decree compensation to the plaintiff for his payments, and expenditures in improvements; *Ellis v. Ellis*, 1 Devereux, Equity, 341, 398; *Albea v. Griffin*, 2 Devereux & Battle's Equity, 9; *Dunn v. Moore*, 3 Iredell's Equity, 364; *Allen v. Chambers*, 4 Id. 125, 130; *Plummer v. Owen*, 1 Busbee, Eq.; *Barnes v. Teague*, 1 Jones, Eq. 277. In Massachusetts and Maine, the equity powers of the courts, by statute, extend only to the specific execution of written contracts; Rev. St. of Mass., c. 81, s. 8; *Dwight v. Pomeroy et al.*, 17 Massachusetts, 303, 327; *Brooks v. Wheelock*, 11 Pickering, 439; Acts of Maine, 1830, c. 462; Rev. St. c. 96, s. 10; *Bubier v. Bubier*, 24 Maine, 42; and they have no jurisdiction to decree specific performance of a parol contract under any circumstances; *Stearns v. Hubbard et al.*, 8 Greenleaf, 320; *Wilton v. Harwood*, 23 Maine, 131; *Jacobs v. The Rail Road*, 8 Cushing, 223.

It is universally agreed, that the ground upon which courts of chancery consider part performance of a parol agreement as creating an equity to have the agreement, specifically executed, notwithstanding the statute, is, that it would be a fraud upon the party if the transaction were not completed; *Hamilton v. Jones*, 3 Gill & Johnson, 127; *Heth's Ex'or v. Wooldridge's Ex'or*, 6 Randolph, 605, 607; *Carlisle v. Fleming et al.*, 1 Harrington, 421, 430; *Townsend v. Houston*, Id. 532, 540; *Anderson v. Chick*, 1 Bailey's Equity, 118, 124; *Rathbun v. Rathbun*, 6 Barbour's S. Ct. 99, 106; *Despain v. Carter*, 21 Missouri,

331; *Gilmore v. Johnston*, 14 Georgia, 683; *Farrar v. Patton*, 20 Missouri, 81. Nothing, therefore, will be deemed part performance, or held to warrant a decree for the specific execution of an oral contract, which does not put the party into a situation which is a fraud, hardship, or deceit upon him, unless the contract is performed; *Tilton v. Tilton*, 9 New Hampshire, 386, 390; *McKee v. Phillips*, 9 Watts, 85, 86; *Allen's Estate*, 1 Watts & Serg. 383, 385; *Crane v. Gough*, 3 Maryland, Chancery, 119; *Hawkins v. Hunt*, 14 Illinois, 42. "The ground of the relief in chancery," said Chancellor Kent, in *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 284, "is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the melioration of the estate, and then to withdraw from the performance of the contract. The courts of equity, in their anxiety to guard the party from the effects of fraud, have been led to some fluctuating decisions on this point of part performance; but the current of cases, both ancient and modern, is pretty uniform and consistent with the principle I have stated, and the tendency of the latter cases is to prefer giving the party compensation in damages, instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative is to be preferred, as it will equally satisfy justice, and will be in coincidence with the provisions, and in support of the authority of the statute." Moreover, it must be some positive and palpable act, having unquestionable reference to the agreement, and clearly intended to be in execution of it; *Hatcher et al. v.*

Hatcher et al., 1 M'Mullan's Equity, 311, 318; *Smith v. Smith*, 1 Richardson's Equity, 130, 133; *Robertson v. Robertson*, 9 Watts, 32, 42; *Ham v. Goodrich*, 2 Fogg, 32; *Davis v. Moore*, 9 Richardson, 215.

"It is well settled, that if a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally refering to, and resulting from, *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed." *Phillips v. Thompson*, 1 Johnson's Chancery, 131, 149; *Anthony v. Leftwich*, 3 Randolph, 238, 247, 277; *Moore v. Small*, 7 Harris, 461; *Cox v. Cox*, 2 Casey, 375. Acts which are applicable to something else than the parol agreement, will not be part performance of it: if, for example, a tenant claiming specific performance of a parol agreement to renew a lease, has merely done acts which it was his duty to do under the old lease, they will not be sufficient; *Byrne v. Romaine*, 2 Edwards, 445, 446.

There is no doubt that the delivery of possession, or the vendee's entry with the vendor's consent, and the making of valuable improvements, will be such part performance as will entitle the vendee to a specific execution; *Parkhurst v. Van Cortland*, 14

Johnson, 15; *Wetmore v. Whites*, 2 Caines' Cases, 87, 109; *Moreland v. Lemasters*, 4 Blackford, 383, 385; *Byrd v. Odem*, 9 Alabama, 756, 764; *Finucane v. Kearney et al.*, 1 Freeman, 65, 69; *Simmons v. Hill et al.*, 4 Harris & M'Henry, 252; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 14; *Ottenhouse v. Burleson*, 11 Texas, 87; *Johnson v. M'Gruder*, 15 Missouri, 365; *Despain v. Carter*, 21 Id. 331; *Dugan v. Colville*, 8 Texas, 126. In like manner, payment of the purchase-money, and being let into possession, are sufficient; *Dugan et al. v. Gittings et al.*, 3 Gill, 140, 157; *Thornton v. Heirs of Henry*, 2 Scammon, 219, 220; *Shirley v. Spencer*, 4 Gilman, 583, 600; *Finucane v. Kearney et al.*, Freeman, 65, 68; *Lessee of Billington v. Welsh*, 5 Binney, 129; *Haines v. Haines*, 6 Maryland, 435. And, though, of the foregoing cases, some connect the making of improvements, and others the payment of the purchase-money, with the entry into possession, yet it is certain that neither of those circumstances is necessary; and possession, though it is strengthened by payment or improvements, is, alone, sufficient to constitute part performance. Delivery of possession, or entry into possession with consent of the vendor, under the contract and in pursuance of it, will entitle the vendee to specific performance of a parol contract; and the reason is said to be, that if the contract were avoided, he would become liable as a trespasser; *Eaton v. Whitaker*, 18 Connecticut, 222, 229; *Tilton v. Tilton*, 9 New Hampshire, 386, 390; *Allen's Estate*, 1 Watts & Sergeant, 383, 386; *Pugh v. Good*, 3 Id. 56, 61; *Johnston v. Glancy*, 4 Blackford, 94, 98, *ante*. [The language held

in *Galbreath v. Galbreath*, 5 Watts, 146; *Woods v. Farmere*, 10 Id. 195; and *Dougan v. Blocher*, 12 Harris, 18, is at variance with this conclusion, and tends to show that possession will not remove the bar of the statute, unless attended or followed by the payment of the purchase-money, or by expenditures on the land. But as the case of the complainant was defective in other particulars, in each of these instances, the point was not necessarily before the court in any of them, and the weight of authority, both in this country and in England, would seem to be in favor of the proposition, that possession taken, under and in pursuance of a parol contract, will warrant a decree for a specific performance, even when the case rests solely upon the contract and the possession, and no payment has been made of any portion of the consideration; *ante*; *Jones v. Peterman*, 3 S. & R. 543, 549; *Allen's Estate*, 1 W. & S. 383, 386.]

But although delivery of possession seems to be sufficient, in case of a sale for valuable consideration, a distinction exists in regard to parol gifts. "To take a parol contract out of the statute," said the court, in *Stewart v. Stewart*, 3 Watts, 253, 255, "it is necessary not only that it be partly performed by delivery of the possession, but that it be on a valuable consideration paid or secured to be paid; or in the case of a gift, that there be an expenditure of money or labor in consequence of it, which comes to the same thing; and this for the plain reason that no equity arises from the naked delivery of the possession, and without a specific equity a chancellor would not interfere to compel a conveyance or execution of the contract." Hence, equity will

not enforce an oral gift of land by a father to a son, although attended or followed by possession, unless valuable improvements are made by the donee, or there are other special circumstances which render a specific performance essential to the purposes of justice; *Pinckard v. Pinckard*, 23 Alabama, 649; *Eckert v. Eckert*, 3 Penn. 332; *Eckert v. Mace*, *Ib.* 364, note. It is not to avoid the Statute of Frauds, however, that a consideration is necessary: equity does not decree the execution of any contract, written or oral, unless there be a valuable consideration, or a meritorious consideration aided by an instrument under seal; *ante*, 324. It would, perhaps, have been more accurate to say, in *Stewart v. Stewart*, that, to have a specific execution of a parol contract enforced, it is necessary not only that it be partly performed, but that it be on valuable consideration; a valuable consideration being necessary to the specific execution of any contract, and part performance being necessary to obviate the Statute of Frauds.

Valuable improvements induced by a parol contract, and in execution of it, will, however, be regarded in equity as a valuable consideration for the purposes of a specific execution; *France v. France*, 4 Halsted, Ch. 650. See *Syler v. Eckert*, 1 Binney, 378; *M'Clure v. M'Clure*, 1 Barr, 374, and *Eckert v. Mace*, 3 Pen. & Watts, 364, note. [The right to enforce oral gifts was, however, questioned in *Moore v. Small*, 7 Harris, 461, 469; while in *Ridley v. M'Nairy*, 2 Humphreys, 174; *Forward v. Armstead*, 12 Alabama, 124; *Evans v. Battle*, 9 Id. 398, and *Pinckard v. Pinckard*, 23 Id. 649, the court refused to protect the donee, although he had

gone into possession, and made valuable improvements on the faith of the gift.

It seems, however, to have been forgotten, that in decreeing the full and final performance of oral contracts, which have been partly performed, equity relies not on the contract, which falls within the statute, but on the acts done under it subsequently, on the faith of its terms, and that this reason applies with the same force, when a gift has led to the expenditure of money or labor on the land given, and would, consequently, operate as a fraud on the donee, unless executed by a conveyance. A license to enter upon or occupy land, is a limited and partial donation of an easement or privilege in the land; and yet nothing is better settled, at least in Pennsylvania, than that a license cannot be rescinded after it has been executed; *Rerick v. Kern*, 14 S. & R. 267; 2 Am. Lead. Ca. 776. The better opinion would, therefore, seem to be, that a parol gift of land will be upheld and enforced by decreeing a conveyance, whenever it has been followed by acts or expenditures on the part of the donee, which would render a revocation of the gift unjust or inequitable; *Syler v. Eckhart*, 1 Binney, 308; *Young v. Glendenning*, 6 Watts, 309; *Mahon v. Baker*, 2 Casey, 519; although equity will not interfere, where the expenditure has been trivial, or does not appear to have been induced by or founded upon the gift, nor when it has been compensated by the past profits of the land, or admits of an adequate compensation from other sources; *Wack v. Sorber*, 2 Wharton, 387. "Slight and temporary erections," said Gibson, C. J., in *Glendenning v. Wood*, "for the ten-

ant's own convenience, give no equity, but an indefeasible right may grow out of permanent improvements."

The cases of *King v. Thompson*, 9 Peters, 204, and *Runker v. Abell*, 8 B. Monroe, 566, tend to sustain the same view of the question, and to show that oral gifts may be rendered irrevocable in equity, by a subsequent expenditure on the property given; at all events, when the donor stipulates that the expenditure shall be made, and thus renders it the consideration or condition of the gift; and the law has been so held in a number of instances by the courts of Maryland and Pennsylvania; *Burns v. Sutherland*, 7 Barr, 103; *Young v. Glendenning*, 6 Watts, 509; *Haines v. Haines*, 4 Maryland Ch. 133; 6 Maryland, 435. When, moreover, the gift cannot be specifically enforced from uncertainty as to the interest meant to be conferred, or from any other cause, the donee may claim reimbursement for expenditures made on the faith of the promise of the donor; *King v. Thompson*; and this was somewhat inconsistently admitted in *Evans v. Battle*, 19 Alabama, 398, although the possibility of a valid oral gift was denied. But it must be remembered, that while gifts made without writing will fall directly within the statute, unless followed by expenditures and improvements on the land, proof of expenditures will be unavailing unless shown to have been induced by or made in consequence of a prior contract or donation; *Eckert v. Eckert*, 3 Penna. 332; *West v. Flannigan*, 4 Maryland, 36. The gift must be proved clearly and distinctly, and the proof that the donee actually expended money under and on the faith of it, be of equal clearness; the possession and improve-

ment of land, being, in themselves, wholly insufficient to give birth to an equity, or take the case out of the statute; *Hugus v. Walker*, 2 Jones, 173.

A parol license to lay out a way or water-course, or even to erect a permanent structure on the land of another, falls, as already stated, within the same principles as a gift or contract, and may be specifically enforced whenever it has been so far acted upon or executed, that irreparable injury would result from its withdrawal; *Pope v. Hay*, 24 Vermont, 560; *Swartz v. Swartz*, 4 Barr, 353; *McIlheney v. McIlheney*, 4 Watts, 317; *Sheffield v. Collier*, 3 Kelly, 82; *Wynn v. Garland*, 19 Arkansas, 23; 2 American Leading Cases, 770, 4th ed.]

The possession, to amount to part performance, must be connected with the contract, and must be in consequence and in pursuance of it, and intended to be in execution of it; *Anderson v. Chick*, 1 Bailey's Eq. 118, 124; *Hood et al. v. Bowman et al.*, Freeman's Chancery, 290, 293; *Robertson v. Robertson*, 9 Watts, 32, 42; *Stoddart v. Tuck*, 5 Maryland, 184; 4 Maryland Chancery, 475; [and must, it has been said, be maintained after it is taken, and down to the time at which relief is sought in equity; *Dougan v. Blocher*, 12 Harris, 28; *Munsdorf v. Howard*, 4 Maryland, 459. The possession must be taken under, and by virtue of the contract, and not be a mere prolongation of a state of things which existed previously; *Poag v. Sandifer*, 5 Richardson's Equity, 170; *Jones v. Peterman*, 3 S. & R. 543; *Christy v. Barnhart*, 2 Harris, 260; *Aitkins v. Young*, 2 Jones, 15; nor an anticipation of a right which is yet to come,

and which, in point of fact, is not given until a subsequent period; *Eckert v. Eckert*, 3 Penna. 332. The entry into possession must, therefore, be contemporaneous with, or subsequent to, the contract, and the prolongation of a prior possession can seldom, if ever, be sufficient; *Christy v. Barnhart*; *Aitkins v. Young*. Hence, a suit to compel the execution of a contract, as finally completed, cannot be sustained by proof of possession taken when the negotiations were began; *Dougan v. Blocher*, 12 Harris, 28; nor can the continuance in possession, of a tenant after the term, warrant the specific performance of an alleged agreement, for the renewal of the lease or the purchase of the reversion; *Jones v. Peterman*; *Christy v. Barnhart*; *West v. Flanagan*, 4 Maryland, 36; *Workman v. Guthrie*, 5 Casey, 495, 572; *Cole v. Potts*, 2 Stockton's Ch. 67; except, perhaps, where alterations and improvements of a permanent nature have been made, with the knowledge of the landlord, which exceed the right given by the lease, and which, consequently, tend to substantiate the allegation, that the term has been merged in a new or additional interest; *Mahon v. Baker*, 2 Casey, 519; although evidence of this description is obviously dangerous, and ought to be scrutinized with the utmost care; *West v. Flanagan*. The possession, must, moreover, be so far exclusive, as to show that it is the possession of the purchaser, and not of the vendor, and evince the birth of a new estate, as distinguishable from the prolongation of that which existed previously; *Haslet v. Haslet*, 6 Watts, 464; *Robertson v. Robertson*, 9 Id. 32, 41; *Frye v. Shippler*, 9 Barr, 91. Hence, when the con-

test is between tenants in common, or other parties, who would be entitled to enter and hold the land, if there were no contract, no decree can, as it would seem, be made, unless the possession is such as not merely to show the existence of a right on one side, but to imply that none exists on the other; *Workman v. Guthrie*, 5 Casey, 495, 512; *Galbreath v. Galbreath*, 5 Watts, 146. "What, then? it may be asked," said Woodward, J., in delivering the opinion of the court, in *Workman v. Guthrie*, "can there be no sale of land by parol, among tenants in common, where all are in possession? Certainly not; because the Statute of Frauds and Perjuries forbids it, and there cannot be such part performances as would take it out of the operation of that wise and salutary rule of titles." What is here said of tenants in common, in possession, would seem equally true of those who are not; the possession of each being the possession of all; and an entry by one having no tendency to substantiate the existence of a sale to him by the others; because it might equally be made, whether there were a sale or not. Exclusive possession is an indispensable ingredient in a suit for the specific performance of an oral agreement, for the sale of land, and the complainant must show, not only that he took possession, but that he took it in pursuance, and in execution of the agreement; *Goucher v. Martin*, 9 Watts, 106, 109; *Haslet v. Haslet*, 6 Id. 464.

An attornment by the tenant, of the vendor, with his assent, will, it seems, be a sufficient change of possession; *Williams v. Landman*, 8 W. & S. 60; *Pugh v. Good*, 3 Id. 56; although it may be rebutted by proof

of the subsequent payment of rent to the vendor, with the assent of the purchaser; *Brawdy v. Brawdy*, 7 Barr, 157. Possession of one tract of land, has been held insufficient to take another and distinct tract out of the statute, when both are sold separately, although at the same auction; *Buckmaster v. Harrop*, 9 Vesey, 341; *Sugden on Vendors*, 125, 9th ed.; or even when the contract of sale is entire, and extends to both; *Allen's Estate*, 1 W. & S. 383; although the latter point is said to be held the other way in England; *Dock v. Hart*, 7 W. & S. 172; but when the agreement was, that a father should purchase one tract, with money belonging to his son, and that the son should take another tract belonging to the father, as an equivalent for the first, the possession of the first tract by the father, and the assessment of the second in the name of the son, were held to take the contract out of the statute, although the son did not go into actual possession; *Lee v. Lee*, 9 Barr, 169. The case of *Croker v. Higgins*, 7 Conn. 342, goes further, by deciding that the execution of a deed from A. to B., is sufficient to warrant a decree for the specific performance of an agreement between A. B. and C., that if A. would convey to B., he would, thereupon, lease the land so conveyed to C.; the ground taken being, that accepting the land, without giving the lease, was a fraud, which required the interposition of equity. But a contract, that if B. will execute a deed to C., A. will convey to B., will not, it has been said, be taken out of the statute, as against A., by the execution of the deed from B. to C.; *Chambers v. Lecompte*, 9 Missouri, 575. There can be little doubt of the soundness of

this decision, because to take a contract for the sale or conveyance of land, out of the statute, by performance, the performance must be on or about the land in question, and be so far founded upon the contract, that it would be wrongful had no contract been made. Hence, an oral agreement between the owners of two adjacent lots, that each will build upon the same line a certain number of feet back from the street, will not be rendered binding by the erection of a building on one of the lots, in compliance with the agreement, because this might obviously have been done, had no agreement been made, and consequently cannot show that an agreement exists; *Wolfe v. Frost*, 4 Sandford's Chancery, 712. For the same reason, improvements by a tenant will be referred to the right which he undoubtedly has, under the lease, and not to that which he attempts to set up, as a purchaser; *West v. Flanigan*, 4 Maryland, 36; unless sufficient evidence is adduced to shift the burden of proof, and raise a presumption of an opposite nature; while it would seem very doubtful, whether the possession of a railroad company, who are authorized by their charter to enter on land, will suffice to give effect to a private oral agreement, between them and the owner; *Jacobs v. The Railroad*, 8 Cushing, 223.

In like manner, possession under a father, or other near relative, who stands in *loco parentis*, has been held insufficient to take a contract out of the statute, although attended by the erection of valuable improvements, because the relation between the parties tends to rebut the presumption, which would have arisen, had the parties been strangers; *Poorman v.*

Kilgore, 2 Casey, 365; *Cox v. Cox*, Ib. 375; *M'Clure v. Johnston*, 1 Id. 306; and the case of *Ham v. Goodrich*, 33 New Hampshire, 32, may be cited in support of the same view of the question.] If the party's possession has no relation to the agreement, but is on a distinct title, it will not be part performance; *Smith v. Smith*, 1 Richardson's Equity, 130, 133, 136: indeed, if it can, fairly and reasonably, be accounted for, without supposing that there was a gift or an agreement to sell, such mere possession will not be a sufficient performance; *German v. Machin*, 6 Paige, 289, 293; *Poorman v. Kilgore*; *Cox v. Cox*.

The contract must be proved as it has been laid, and the possession and other acts of performance must pursue and substantiate the contract proved; *The Chesapeake and Ohio Canal v. Young*, 3 Maryland, 480; *Munsdorf v. Howard*, 4 Id. 459; *Ham v. Goodrich*, 33 New Hampshire, 32; so that the *allegata* and *probata*, may together make a consistent whole, and render it apparent that the alleged agreement between the parties, has been substantiated and executed by their acts. The possession must clearly appear to have been taken by the known permission of the vendor; and if it be against or without his permission, it will not be availing: but an entry, and a continuance in possession with the knowledge and acquiescence of the vendor, would reasonably be evidence of his consent; *Lord v. Underdunk*, 1 Sandford, 46, 48; *Jervis v. Smith and others*, Hoffman, 470, 475; *Thompson v. Scott and Bostick*, 1 M'Cord's Chancery, 32, 39. If possession be taken and continued under the contract, and in consequence of it, and

with the vendor's assent, it will be sufficient part performance, though it be not in pursuance of a provision in the contract; it is enough, that the possession is an act which could not be done with any other view than that of performing the agreement; *Harris v. Knickerbacker*, 5 Wendell, 638, 644; *Smith v. Underdunk*, 1 Sandford, 579, 582. In Pennsylvania, it has been decided, that it is necessary the possession should be delivered in the lifetime of the vendor; *Sage v. McQuire*, 4 Watts & Serg. 228, 229.

[It may, perhaps, therefore, be laid down as a general principle, that to take a contract out of the statute, on the ground that it has been acted upon, the contract must be evinced and substantiated by the act, and the act appear to have been done in pursuance of the contract; *Stoddart v. Tuck*, 5 Maryland, 18; *Mumsdorf v. Howard*, 4 Id. 459; *Gough v. Cram*, 3 Maryland Chancery, 132; *Duval v. Myers*, 2 Id. 401. In *Johnson v. Hubbell*, 2 Stockton's Chancery, 332, however, the chancellor seems to have been of opinion, that an oral promise by a father to a son, in the presence of a daughter, to devise land to the son, in consideration of an immediate conveyance, by the latter, of other land to the daughter, might be taken out of the statute, with regard to the land to be devised, by the execution of the conveyance; although it is difficult to understand why payment in land, should give a higher or better equity than payment in money, which is admitted on all hands not to warrant a specific performance; *ante*. And in *Rhodes v. Rhodes*, 3 Sandford's Chancery, 279, an agreement between two brothers, that one should

maintain and take care of the other, who was epileptic, till he died, in consideration of receiving a conveyance of all his property, was specifically enforced, on proof that the epileptic had been faithfully nursed and maintained, while he lived, although no entry had been made, nor any act of part performance done on the land to be conveyed; but the hardship of the case may have influenced the judgment of the vice-chancellor, and the decision is anomalous, if not questionable. Some doubt may also be entertained, as to the soundness of the decree in *Gough v. Crane*, 3 Maryland Chancery, 119; 4 Maryland, 316; where the delivery to an intended husband, of bonds and notes belonging to the wife, was held to take an oral agreement, that they should be his absolutely, out of the statute, although he would, obviously, have been entitled to the custody of his wife's choses in action, had no contract been made, by virtue of his marital interest and authority. There is, however, no reason to doubt, that a tripartite agreement between A., B. and C., that if C. will purchase an estate from B., which has been mortgaged to A., and apply the purchase-money in part payment of the mortgage, the land shall be released as soon as the payment is made, will be specifically enforced against A., on proof that C. went into possession under the agreement, and that the purchase-money was paid, as stipulated, to A., because the payment and possession together, show that A. is party to the contract, although each might be insufficient, if taken separately; *Malins v. Brown*, 4 Comstock, 403.]

Where the contract is entire and

indivisible, though relating to different parcels of land, the taking possession of one parcel, has been held in New York to be a sufficient performance of the whole; *Smith v. Underdunk*, 1 Sandford, 579, 581; and this appears to be the more correct view; but in Pennsylvania, the point has been differently decided, and such part possession held insufficient as to the whole; *Allen's Estate*, 1 Watts & Sergeant, 384, 389: see *Pugh v. Good*, 3 Id. 56, 61: and it would seem also to be inoperative as to the part, for want of an antecedent contract to which it could be applicable, the original contract being entire; see *McClure v. McClure*, 1 Barr, 374, 379. Some of the Pennsylvania cases declare that the possession must be definite in its limits, exclusive and notorious; *Haslet v. Haslet*, 6 Watts, 464; *Fryer v. Shepler*, 7 Barr, 91, 93; *Brawdy v. Brawdy*, Ib. 157, 161.

But though entry into possession with the vendor's consent, by a purchaser who was previously not in possession, is a part performance, yet continuance in possession by a tenant who was in possession of the premises at the time of the contract, will not be considered as part performance; *Johnston v. Glancy*, 4 Blackford, 94, 99; *Anthony v. Leftwitch*, 3 Randolph, 238, 256; *Hatcher et al. v. Hatcher et al.*, 1 McMullan's Equity, 311, 318. See also, *Smith v. Smith*, 1 Richardson's Equity, 130; and *Brawdy v. Brawdy*, 7 Barr, 157, 161.

Possession taken by the vendee's lessee, is the vendee's possession, and will be part performance; *Pugh v. Good*, 3 Watts & Sergeant, 56, 63; and if the land is in the possession of a tenant at the time of the sale, and the vendor agrees that the rent should

be paid to the vendee, and the tenant attorns to the vendee, this is sufficient delivery of possession, according to *Williams v. Landman*, 8 Watts & Sergeant, 56, 60.

It is fully settled at the present day, that payment of the purchase-money is not of itself sufficient to withdraw a parol agreement from the operation of the statute, because the money may be recovered back at law; *Smith v. Smith*, 1 Richardson's Eq. 130, 132, 135; *Eaton v. Whitaker*, 18 Connecticut, 222, 229; *Finucane v. Kearney et al.*, 1 Freeman's Chancery, 65, 68; *Hood v. Bowman et al.*, Ib. 290, 294; *McKee v. Phillips*, 9 Watts, 85, 86; *Parker v. Wells*, 6 Wharton, 153, 161; *Allen's Estate*, 1 Watts & Sergeant, 383, 389; *Rankin v. Simpson*, 7 Harris, 471; *Parke v. Dwight*, 20 Missouri, 85; *Ham v. Goodrich*, 33 New Hampshire, 32, 39; *Black v. Black*, 15 Georgia, 445. Formerly, however, the opinion was, that payment of the whole, or a substantial part of the purchase-money, would be a part performance in equity; *Witmore v. White*, 2 Caines' Cases, 87, 109; and that was adhered to by Johns, C., in *Townsend v. Houston*, 1 Harrington, 532, 541.

If the consideration of the sale be not money, but labor and services, it may depend upon circumstances whether the execution of the contract by the vendee would be a sufficient part performance to take the case out of the statute. If the labor and services can be estimated and compensated in money, so as to make the vendee whole, by damages, they would not be: but where the circumstances are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is

obvious that they were not intended to be measured by such a standard, it would be impracticable to restore the party to the situation he was in before, or to give him a compensation in damages; and the case comes within the rule which applies where possession has been taken or money been laid out in improvements; *Rhodes v. Rhodes*, 3 Sandford, 279, 284. The Pennsylvania cases, however, declare that nothing but delivery of possession will entitle the party to a specific execution: *Peifer v. Landis*, 1 Watts, 392; *McKee v. Phillips*, 9 Id. 85, 86; [while it was intimated in *Moore v. Small*, 7 Harris, 461, 466, and *Dougan v. Blocher*, 12 Id. 28, that the rule ought to be still further narrowed, and a specific performance refused unless the possession is taken under circumstances, which preclude the possibility of compensation in money, and would render it inequitable and unjust, not to enforce the contract specifically. However this may be, it would seem well settled that possession is essential, and that an actual or constructive surrender of possession, as by taking a lease from the vendor or attorning to him as a tenant, will preclude the right to a specific performance of an oral agreement, by putting an end to the only ground on which it rests; 7 Barr, 157.]

Delivering an abstract of the title, or giving instructions to prepare a deed, will not take a case out of the statute, though they may aid the evidence of an agreement; *Smith v. Smith*, 1 Richardson's Equity, 130, 138.

An agreement to sign a written instrument, which the party was prevented by death from doing, was held to be sufficient to entitle to authorize

a specific performance in *Finucane v. Kearney et al.*, 1 Freeman, 65, 69. "An acknowledged exception to the statute," said the chancellor, in that case, "is where the agreement is intended to be reduced to writing according to the statute, but is prevented by the fraud of one of the parties. And so I apprehend the rule would be, where, as in this case, the contract was written out, and one of the parties promised to sign it, but was prevented by inevitable accident. It is the peculiar province of courts of equity to relieve against accidents as well as fraud." And it may be laid down as a general principle, that whenever the title to land has been acquired by an actual or constructive fraud, equity will regard the case as falling without the provisions of a statute meant to suppress and not to encourage or protect covin, and give relief to the injured party, even when the fraud is proved by oral testimony, and without the aid of written evidence; 2 Story's Equity, 57, 68; *Willink v. Vanderveer*, 1 Barbour, 599; *Miller v. Cotten*, 5 Georgia, 346; *Shields v. Trammell*, 19 Arkansas, 51; *Trapnell v. Brown*, Ib. 39; *ante*, 221, 274; *post*, vol. 2, note to *Woollam v. Hearn*.

To render the delivery of possession effective, there must be an antecedent contract of which it is the partial or entire execution: *Eckert and others v. Eckert and others*, 3 Penrose & Watts, 332, 357; and part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court; if the contract be vague or uncertain, or if the evidence of it be unsatisfactory, a court of equity will not exercise its extraordinary jurisdiction to enforce

it, but will leave the party to his legal remedy: *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 284; *German v. Machin*, 6 Paige, 288, 292; *Anthony v. Leftwich*, 3 Randolph, 238, 246; *Colson v. Thompson*, 2 Wheaton, *336, 341; *Miller and others v. Cotten and others*, 5 Georgia, 341, 351; *Wallace v. Brown*, 2 Stockton's Chancery, 308, 311; *Stoddart v. Tuck*, 5 Maryland, 18; *The Church of the Advent v. Farrow*, 7 Richardson's Eq. 73, 78; *Allen v. Chambers*, 4 Iredell's Eq. 125, 128; *Thomson v. Scott and Bostick*, 1 M'Cord's Chancery, 32, 38, 39; *Massey v. M'Ilvain and others*, 2 Hill's Chancery, 421, 426; *Hatcher et al. v. Hatcher et al.*, 1 M'Mullan's Equity, 311, 315; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 391; *Carlisle v. Fleming et al.*, 1 Harrington, 421, 431; *Townsend v. Houston*, Ib. 532, 545; *Sage v. M'Guire*, 4 Watts & Sergeant, 228, 229; *Charnley v. Hansbury*, 1 Harris, 16, 21; *Moore v. Small*, 7 Harris, 461, 470; *Rankin v. Simpson*, 7 Id. 471; *M'Curd v. Johnston*, 1 Casey, 306; *Printup v. Mitchell*, 7 Georgia, 558; *Cox v. Cox*, 2 Casey, 375. [Thus, in *Cox v. Cox*, the court held that the plaintiff must state his case as he means to prove it, and then prove it as it has been stated; and will not be allowed to allege or prove different or inconsistent contracts and stipulations, and then leave the court to decide which of the agreements thus proved is the true one. The extent and boundaries of the land, must also be clearly made out; *Robertson v. Robertson*, 9 Watts, 32, 42; *Woods v. Farmare*, 10 Id. 195, 205, 207; *Moore v. Small*, 7 Harris, 461, 470. It is enough, however, that the court

can ascertain the terms with reasonable certainty, from the whole evidence; *Rhodes v. Rhodes*, 3 Sandford, 279, 281; *Parkhurst v. Van Cortland*, 14 Johnson, 15, 37; *Burns v. Southerland*, 7 Barr, 103, 106.]

In answer to a bill for specific performance of a written agreement, a defendant may prove by parol evidence, that the written instrument sought to be enforced against him, does not truly express the agreement or the whole of it, but through fraud, surprise or accident, varies from the intention or understanding of the parties; *Best v. Stow*, 2 Sandford, 298, 300; *Dwight v. Pomeroy et al.*, 17 Massachusetts, 303, 328; *Brooks v. Wheelock*, 11 Pickering, 439, 440. Ordinarily, a complainant cannot, even in case of part performance, resort to parol proof, in explanation of, or addition to, or as a substitute for, an existing written agreement; because a written agreement is generally taken to contain the contract of the parties, and because a contract cannot rest partly in writing and partly in parol. See *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 283; *Heth's Ex'r v. Wooldridge's Ex'r*, 6 Randolph, 605, 610; *Kay and Cassey v. Curd, &c.*, 6 B. Monroe, 100, 103; see also *Dwight v. Pomeroy et al.*, and *Brooks v. Wheelock*. But fraud and mistake suspend the application of this rule in equity. Where a written agreement is accompanied by other stipulations in parol, under circumstances which would make the insisting on the written matter alone, a fraud, a complainant may claim the benefit of the parol matter in connection with the written, and the court will, under such circumstances, disregard the writing as

containing the contract, and treat the whole transaction as a verbal contract; and then, if there has been a part performance, it may, upon that basis, receive parol proof of the whole agreement, independently of the writing or in connection with it, in order to make out the contract. *Phyfe v. Wardell*, 2 Edwards, 47, 50, 51; *Parkhurst v. Van Cortland*, 14 Johnson, 15: see *Dock v. Hart*, 7 Watts & Sergeant, 172; and *Coles v. Bowne*, 10 Paige, 527, 535. Mistake, clearly made out, will have the same effect as fraud, in laying a ground for departing from the written agreement; *Tilton v. Tilton*, 9 New Hampshire, 386, 392; *Philpot v. Elliott*, 4 Maryland Chancery, 83: see *post*, vol. 2, note to *Woollam v. Hearn*. [Parol evidence may, moreover, always be given for the purpose of applying the contract to its subject-matter, and showing what the language used to designate the specific property sold referred to, by showing what was its habitual signification in the mouths of the parties, and of others who were acquainted with the locality; *Gerrish v. Towne*, 3 Gray, 82.

The weight of authority would seem to be, that a subsequent oral agreement, to vary a written contract for the sale or transfer of an estate in land, is as much within the provisions of the Statute of Frauds, as if it had been made in the first instance; and consequently cannot be made the ground of a decree in equity, unless it has been so far executed or acted upon, as to come within the principles on which equity decrees the performance of oral agreements; Sugden on Vendors, 146, 151, 9th ed.; *Espy v. Anderson*, 2 Harris, 308; *M^c Corkle v. Brown*, 9 Smedes & Marshall, 167;

post, vol. 2, note to *Woollam v. Hearn*. It has, accordingly, been held, that where the original agreement has been reduced to writing, the complainant cannot introduce proof of subsequent unwritten modifications, unless he can show acts of part performance, referable solely to the charge thus made, and which would not have been done under the original agreement; Sugden on Vendors, 151; *Espy v. Anderson*; *M^c Corkle v. Brown*; *Stevens v. Cooper*, 1 Johnson's Chancery, 425, 430; *Price v. Dyer*, 17 Vesey, 356-364. The defendant is, however, in this, as in most other cases, entitled to rebut the complainant's equity, by anything which shows that its exercise would be inequitable; *Workman v. Guthrie*, 5 Casey, 495, 570. He may, therefore, unquestionably prove, that particular parts of the contract have been varied, or that a rescission has taken place of the whole, on the faith of which he has acted, and may in this way prevent a decree for the specific performance of the agreement as it stood at the first instance; *Legal v. Miller*, 2 Vesey, 299; *Boyce v. M^c Cullough*, 3 W. & S. 429; *M^c Corkle v. Brown*; even, as it would seem, when the acts thus done are not, strictly speaking, acts of part performance.

But as this course of decision proceeds strictly on the injustice of permitting the complainant to retract a promise or engagement, on the faith of which the defendant has acted, and which cannot be withdrawn without injury to the defendant, it is only applicable in those cases where some injury would be inflicted by enforcing the contract as originally framed, and will be wholly inapplicable when the situation of the parties remains un-

changed, and nothing has been done on the faith of the proposed alteration; *Price v. Dyer*, 17 Vesey, 356, 364. It has, however, been said, that the defendant may resist a suit for a specific performance, by proving that the contract has been absolutely waived, or abandoned, by the plaintiff, without going further, or adducing evidence to show that he has acted upon the waiver, or that he will sustain any injury by its withdrawal; *Botsford v. Burr*, 2 Johnson's Chancery, 576; *Price v. Dyer*; *Boyce v. McCullough*; *Raffensberger v. Cullison*, 4 Casey, 427; *Workman v. Guthrie*, 5 Id. 495, 509. But the truth of this proposition is questioned by Mr. Sugden, (Sugden on Vendors, 151, 9th ed.,) and would seem somewhat doubtful, unless, perhaps, in those cases when lapse of time has destroyed the right to enforce the contract at law, and weakened the position of the complainant in equity. All that the cases of *Boyce v. McCullough*, *Workman v. Guthrie*, and *Raffensberg v. Cullison*, actually establish, is the plain proposition, that when a subsequent purchaser buys on the faith of a waiver or relinquishment, by the first, the latter will be estopped from contesting rights which he himself has sanctioned. And it would seem, that even if the contract can be annulled while still merely executory, and the right to enforce it specifically defeated by an oral waiver or recession, this result will not follow after it has been executed by the payment of the purchase-money, attended or followed by a delivery of possession, which confers an equitable estate on the purchaser, and entitles him to the protection of the Statute of Frauds; *Goucher v. Martin*, 9 Watts, 106, 111.

It would also appear, that the complainant and respondent, in a bill filed for a specific performance, ought to be so far upon the same footing, as to preclude the respondent from setting up any act or default, caused or sanctioned by his own acts or declarations, as a bar to the equity of the bill. The distinction is plain, between an agreement to vary or abandon the rights given by a writing, intended to be mutually binding and insusceptible of being recalled; and a dispensation, or waiver, which, although revocable in its own nature, may yet be a good excuse or justification, while it endures; the one being a mere license, and therefore capable of being conferred orally, even when land is in question, the other, an actual variation of the contract, and consequently within the Statute of Frauds; *Pierrepoint v. Bernard*, 5 Barbour, 364; 2 Selden, 279; 2 American Lead. Cases, 735, 4th ed. This distinction is one of considerable importance, and may, perhaps, serve to reconcile the authorities with each other, and with the provisions of the statute; *ante*. See *post*, vol. 2, note to *Woollam v. Hearn*.

Contracts in consideration of marriage, may, like other contracts within the Statute of Frauds, be taken out of it by a part performance, which renders it inequitable not to execute the whole. The law was so held in *Duval v. Getting*, 3 Gill, 138, with reference to an oral gift of land to a daughter, in view of her approaching marriage, followed by possession on her part, and that of her husband; and the same rule was applied by the Court of Appeals, in *Gough v. Crane*, 3 Maryland Chancery, 119; 4 Maryland, 311, overruling the decision of the court below;

and an oral agreement between a woman and her intended husband, that he should be entitled to her *choses in action*, absolutely, in consideration of a yearly allowance for pin-money, enforced against the representatives of the wife, after her death, on proof that the husband had taken possession of the bonds at the marriage, and paid the pin-money subsequently, although it may be thought, that a possession to which the husband would have been equally entitled, had no contract existed, could not serve to evince the existence of the contract.

An agreement for an exchange of lands, followed by an entry into possession, and acts of ownership done on the faith of the agreement, will be specifically enforced; *Reynolds v. Hewitt*, 3 Casey, 176; *Parrill v. McKinley*, 9 Grattan, 1; *Johnston v. Johnston*, 6 Watts, 370; *Mills v. Mills*, 8 W. & S. 136; *Beebee v. Dorand*, 22 Barbour, 255; and the better opinion would seem to be, that the entry and possession of one party will take the case out of the statute, as to both, although possession be not actually taken by the other; *Dock v. Hart*, 7 W. & S. 172; *Lee v. Lee*, 9 Barr, 169; *Reynolds v. Hewitt*: and, when two parties, claiming land under conflicting and adverse titles, agree to terminate the dispute by dividing the land between them, and each takes possession of the share allotted to him by the agreement, equity will regard the compromise as binding on both, and will not allow it to be defeated, subsequently, by either; *Wend v. Terry*, 2 Douglass, (Michigan,) 344; *post*, vol. 2, note to *Stapleton v. Stapleton*. Equity will also enforce the fulfilment of a promise to confer a title by devise, in consideration of a re-

ciprocal devise or present conveyance; *Rivers v. Rivers*, 3 Dessausure, 195; *Johnson v. Hubbell*, 2 Stockton's Ch. 332; when reduced to writing, or sustained by a part performance; although from the nature of contracts of the latter description, there can seldom be a sufficiently full and specific action under them, during the lifetime of the parties, to warrant the intervention of equity at their death; *Mundorf v. Howard*, 4 Maryland, 459; and it is plain, that an oral promise to devise, unsustained by possession, cannot be enforced by equity; *Steffore v. Bartholomew*, 2 Carter, 153. Indeed, whenever a gift or contract is not to be carried into effect until a future period, as when a father promises to convey or devise land to a son, no act can well amount to a part performance, until the time arrives at which the contract is to be performed; *Hann v. Goodrich*, 33 New Hampshire, 32; *McClure v. Johnston*, 1 Casey, 405; *Eckert v. Eckert*, 3 Penna. 332; *Christy v. Barnhart*, 2 Harris, 260. See *Morgan v. Tollett*, 2 Jones, Eq. 39; where it was said, that a promise to devise, partakes of the ambulatory character, which would belong to the devise, if made, and may, consequently, be revoked or recalled at pleasure.]

If the bill shows that the agreement was parol, and no sufficient ground is set forth to take the case out of the statute, the defendant may demur; but if it be stated generally in the bill that such an agreement was made, the court will presume that it was a legal and valid agreement, and the defendant must either plead the fact that it was not in writing, or must allege that fact, and insist upon it as a defence, in his answer. He may deny

the contract, entirely or in essential particulars, or may require the plaintiff to prove it; and if he does that, and an issue arises as to the substance of the contract, it must be proved by writing, or by parol, supported by part performance. The defendant may admit the parol agreement, and insist upon the statute in his answer as a bar to any relief thereon; *Barnes v. Teague*, 1 Jones, Equity, 277; *Ash v. Buggy*, 6 Indiana, 259; unless there has been such part performance as to take the case out of its operation; if he admits the agreement in his answer or by not answering, and does not insist upon the statute by plea or answer, he is deemed to have waived or renounced the benefit of it; no evidence of the agreement will be necessary, and a decree will be made upon that admission; *Albert v. Ware*, 2 Maryland Chancery, 169; 6 Maryland, 66; *Garner v. Shebblefield*, 5 Texas, 552; *Chetwood v. Brittain*, 1 Green, Chancery, 430; *Dean v. Dean*, 1 Stockton, 425; *Baker v. Hollobough*, 15 Arkansas, 322; *Cozine v. Graham*, 2 Paige, 178, 181; *Harris v. Knickerbacker*, 5 Wendell, 638, 643; *Vaupell v. Woodward*, 2 Sandford's Chancery, 143, 144; *Jer-vis v. Smith and others*, Hoffman, 470, 476; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 389; *Thornton v. Heirs of Henry*, 2 Scammon, 219, 220; *Tarleton v. Vietes*, 1 Gilman, 470, 473; *Switzer et al. v. Skiles et al.*, 529, 534; *Patterson and others v. Ware*, 10 Alabama, 445, 447; *Woods and others v. Dille and others*, 11 Ohio, 455; *Minus v. Morse and others*, 15 Id. 568, 571; *Allen v. Chambers*, 4 Iredell's Equity, 125,

129; *Hall and Wife v. Hall et al.*, 1 Gill, 383, 386.

When the specific execution of a parol agreement cannot be decreed, in consequence of the uncertainty in its terms, or of the statute being relied on, the court will, if there is no remedy at law, or it is uncertain or embarrassed, or under circumstances of special equity, decree compensation to the extent of the purchase-money paid, and the value of beneficial and lasting improvements; *Phillips v. Thompson*, 1 Johnson's Chancery, 132, 150; *Parkhurst v. Van Cortland*, Ib. 274, 286; *Johnston v. Glancy*, 4 Blackford, 94, 99; *Mialhi v. Lassabe*, 4 Alabama, 713, 714; *Anthony v. Leftwich*, 3 Randolph, 238; *Payne v. Graves*, 5 Leigh, 561; *Rockwell v. Lawrence*, 2 Halsted's Chancery, 190; *Evans v. Battle*, 19 Alabama, 398; *King v. Thompson*, 9 Peters, 218; *Shepherd v. Brown*, 9 Gill, 32, 41. See *Bowie v. Stonestreet*, 6 Maryland, 418, where the rule above stated, is cited and approved by the court, in the course of their opinion.

The Statute of Frauds is, in later times, regarded with favor, as a salutary and judicious provision, founded in convenience and sound policy; the prevailing disposition in the courts is to uphold and enforce it; the doctrine of part performance of parol contracts is reluctantly admitted; and the determination is general, not to act upon it further than adjudged cases, or the principles established by them, require. See *Massey v. McIlwain and others*, 2 Hill's Chancery, 421, 426; *Johnston v. Glancy*, 4 Blackford, 94, 99; *Hood et al. v. Bowman et al.*, 1 Freeman, 290, 294;

Anthony v. Leftwich, 3 Randolph, 238, 244; *Allen's Estate*, 1 Watts & Sergeant, 383, 388; *Frye v. Shepler*, 7 Barr, 91, 93; *Wallam v. Brown*, 2 Stockton's Chancery, 308; *Moore v. Sewell*, 7 Harris, 461; *Poorman v. Kilgore*, 2 Casey, 365; *Cox v. Cox*, Ib. 395. "I agree," said Chancellor Kent, "with those wise and learned judges, who have declared that the courts ought to make a stand against any further encroachment on the statute, and not to go one step beyond the rules and precedents already established;" *Phillips v. Thompson*, 1 Johnson's Chancery, 132, 149. "The beneficial provisions of the Statute of Frauds, have been sufficiently broken

in upon already," said a succeeding Chancellor; "and the doctrine of part performance should not be extended to new cases which do not come clearly within the equitable principles of previous decisions;" *German v. Machin*, 6 Paige, 289, 293.

The doctrine that part performance takes a case out of the operation of the statute, exists only in equity; it has no application to courts of law; *Jackson v. Pierce*, 2 Johnson, 221, 223; *Norton v. Preston*, 15 Maine, 14; *Adams v. Townsend, Administrator*, 1 Metcalf, 483; *Eaton v. Whitaker*, 18 Connecticut, 222, 221; *Barickman v. Kuydendall*, 6 Blackford, 22, 24.

SPECIFIC PERFORMANCE.

[*640]

*CUDDEE *v.* RUTTER.

TRIN. TERM, 6 GEO. 1.

REPORTED 5 VIN. AB. 538, PL. 21.¹

SPECIFIC PERFORMANCE OF AGREEMENTS RELATING TO PERSONAL PROPERTY.]—*A bill in equity will not lie for specific performance of an agreement to transfer South Sea stock.*

BILL for a specific performance of an agreement to transfer stock.—The case was, the defendant agreed with the plaintiff to transfer to him £1000 South Sea stock, upon the 20th of November then next following, at the rate of £104 per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration money; but the defendant, in drawing the note, had put in the usual words, "or pay the difference," which the plaintiff struck out, and would not agree to, and then the defendant signed the note.

After the bargain was made, and before the time of delivering the stock, the South Sea stock rose considerably in value, and the defendant did not deliver the stock at the day, but a few days afterwards offered to pay the differ-

¹ S. C., nom. Cud v. Rutter, 1 P. Wms. 570; 2 Eq. Ca. Ab. 18, pl. 8; Prec. Ch. 534, cited, nom. Scould v. Butter; Reg. Lib., A. 1719, fol. 35; Reg. Lib., B. 1719, fol. 411

ence, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c.

Sir *Robert Raymond* and Mr. *Vernon*, for the defendant, insisted, that buying of stock in this manner, to be delivered at a future time, at a certain price, was in the nature of a wager upon the rise and fall of stock, and therefore paying the difference is a sufficient performance of the contract: that a contract for sale of stock differs from *other contracts for sale of an [*641] house, lands, &c., for in such things there may be a particular convenience or benefit to the buyer in this individual house, &c.; but it is not so in stock, for one £1000 is as good as another £1000 stock, and is to be purchased daily in Exchange alley: that the plaintiff has his remedy at law for the damages, viz., the difference, and that is the justice of the case between the parties: that it is discretionary in the Court to decree a specific performance of an agreement, and that in many cases the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir JOSEPH JEKYLL, M. R., said, that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff, at the making of the agreement, that he should not be obliged to take the difference, but would have the stock actually delivered to him; and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage; and decreed that the defendant do transfer the stock, and pay the dividends since the 20th November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

On an appeal from this decree, Lord Chancellor Parker,¹ upon opening the cause, asked if the plaintiff was at the South Sea House upon the day appointed for transferring the stock, to demand it, and tender the money, and seemed strongly against the plaintiff, and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract; the buyer shall not, by a bill in equity, compel the seller to a specific performance of this agreement, but the buyer is left to his remedy at law, for breach of the agreement to recover damages, id est, the difference between the price agreed on by the parties, and the price of corn upon the market-day.

*It was said, it was the common justice of this Court to compel the party to a specific performance of his agreement, if the same was just [*642] and reasonable, and fairly obtained: that this was a just, reasonable, and fair agreement in all the circumstances; it was the current price of the stock at that time, and no imposition upon the defendant: that the subsequent rise could not alter the case, for it was an equal hazard that it might fall, and the parties

¹ Afterwards Earl of Macclesfield.

in such contracts executory must take their chance. They compared it to the case of a contract for so many bales of silk, or any other merchandise, to be delivered at a future day, at a certain price: if the value of the silk, or other goods, doth rise before the day, that is no excuse for non-performance of the contract. So, in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement. They said, that, from the time of the contract to the time appointed for the delivery, the stock did not rise above £12 per cent.; that it was not more at the time of filing the bill, which was in January, 1718; nay, it was not more at the time of the decree pronounced by the Master of the Rolls in Michaelmas Term last; and though the stock has risen since to a vast price, between £900 and £1000 per cent., if the plaintiff¹ suffers by that it is his own fault, in not performing his contract sooner, when he was demanded so to do, and in not obeying the decree, as he ought to have done: that whatever has happened since cannot alter the case: that the contract was reasonable at the time it was made, and so it was when the bill was filed and the decree pronounced.

It was said for the defendant, that the rule was laid down too general for compelling the execution of agreements between the parties; that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law: that it was very unreasonable now to compel the defendant to transfer £1000 South Sea stock to the plaintiff, at 104*l.* 10*s.* per cent., when it was worth £1000 per cent.: that paying the difference *at the day was a good performance [*643] of this contract: that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time; and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South Sea House upon the day to accept and pay for the stock. They cited the case of *The Marquess of Normandy v. Lord Berkly*, temp. Lord Somers, C., who said, in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case, as a jury may do, but must decree the whole contract to be performed.

It was replied, that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the stock delivered to him; but the defendant said that he had not the stock, and therefore could not deliver it; and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South Sea House to accept the stock; that, this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it; and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

LORD CHANCELLOR PARKER.—There is no reason to bring this bill for a

¹ Qu. defendant.

specific performance of this agreement, because there is no difference between this £1000 South Sea stock and another £1000 stock, which the plaintiff might have bought of any other person upon the very day; and the plaintiff doth not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference.

*These sorts of contracts are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers [*644] the intention of the parties; and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's.

Secondly, it appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement. If there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court would not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

Thirdly, in contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution. The decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind; but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the Master inquire what the difference was at the day, and the defendant pay it to the plaintiff, with interest, but no costs.

*Where a contract in writing respecting real property, in conformity [*645] with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances, unobjectionable, it is as much of course for a court of equity to decree a specific performance, as it is for a court of common law to give damages for the breach of such a contract: *Hall v. Warren*, 9 Ves. 608. The original and sole foundation of the jurisdiction to decree the specific performance of contracts is simply this—that an award of damages at law will not give a party the compensation to which he is entitled; that is, will not put him in a situation as beneficial to him as if the agreement were specifically performed: *Harnett v. Yeilding*, 2 S. & L. 553.

The decision in the principal case shows that specific performance of agreements relating to personalty will not, as in the case of agreements relating to

realty, be invariably decreed: it will, however, be seen, upon examining the authorities, that whenever courts of equity refuse to interfere with agreements relating to personalty, they do so, not because of any difference between real and personal property, but because damages at law will be an adequate compensation; and there is, therefore, no reason why the jurisdiction of equity should be called into action. Upon this ground chiefly the Lord Chancellor, in the principal case, refused to decree the specific performance of the agreement, observing, that it differed much from "a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's." So, likewise, in *Adderley v. Dixon*, 1 S. & S. 610, Sir John Leach, V. C., observes—"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case, afford a complete remedy. Thus, a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So, a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock or goods." In *Buxton v. Lister*, 3 Atk. 384, Lord *Hardwicke, C., lays down the same distinction between contracts relating to chattels and contracts relating to lands; but he does not give the same reasons for the distinction. "In general," he says, "this Court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c.; for, as those are contracts which relate to merchandise, that vary according to the different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action that party might not have paid, perhaps, above a shilling damage. As to the cases of contracts for the purchase of lands or things that relate to realties, those are of a permanent nature; and, if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade." The reasons, however, given by Lord Hardwicke for a court of equity not entertaining jurisdiction in cases of chattels, as is well observed by Chief Baron Richards, would equally apply to contracts for the purchase of land, which falls and rises in value in an extraordinary manner. See *Wright v. Bell*, 5 Price, 329. The reasons given by Sir John Leach are the best.

The question, therefore, in all cases where the specific performance of an agreement relative to personalty is sought, is this—will damages at law afford an adequate compensation for breach of the agreement? If it will, there is no occasion for the interference of equity; the remedy at law is complete: if

it will not, specific performance of the agreement, as in the case of an agreement relating to realty, will be enforced.

In *Cappur v. Harris*, Bunb. 135, Mr. Baron Gilbert laid down, as a general rule, that a court of equity will not aid a person coming to have a contract for South Sea stock carried into execution, but will leave him to such remedy as he could have at law. See, also, *Nutbrown v. Thornton*, 10 Ves. 161, where Lord Eldon observes, "It is now perfectly settled that this Court will not enforce the specific performance of an agreement for a transfer of stock; but in a book I have of Mr. Brown's, I see Lord Hardwicke did that." So, in *Buxton v. Lister*, 3 Atk. 384, Lord Hardwicke says, "In general, this Court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c."

In the following cases, however, it has been held, that, as damages at law could not be correctly estimated, or would not furnish a complete and adequate remedy for the non-performance of a contract relative to personal property, equity ought to decree specific performance. In *Taylor v. Neville*, cited in *Buxton v. Lister*, *3 Atk. 384, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the reason given by Lord Hardwicke is, "that such sort of contracts differ from those that are immediately to be executed;" and they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball v. Coggs*, 1 Bro. P. C. 140, Toml. ed., specific performance was decreed, in the House of Lords, of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff; for damages might be no complete remedy, being to be calculated merely by conjecture: and to compel the plaintiff, in such a case, to take damages, would be to compel him to sell the annual provision during his life, for which he had contracted at a conjectural price. In *Buxton v. Lister*, 3 Atk. 385, Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that, as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance,—per Sir J. Leach, V. C., 1 S. & S. 610. See *Pollard v. Clayton*, 1 K. & J. 462; and the comments of Sir W. Page Wood, V. C., on *Taylor v. Neville*, and *Buxton v. Lister*, p. 474.

In *Adderley v. Dixon*, 1 S. & S. 607, the plaintiffs, having purchased and taken assignments of certain debts which had been proved under two commissions of bankruptcy, agreed to sell them to the defendant for 2s. 6d. in the pound. Sir John Leach, V. C., compelled a specific performance of the

agreement at the suit of the vendor. "The present case," observed his Honor, "being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me, that, upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true, that the present bill is not filed [*648] *by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." So, in *Wright v. Bell*, 5 Price, 325; Dan. Ex. Rep. 95, a specific performance of a contract to purchase a debt was enforced.

In *Withy v. Cottle*, 1 S. & S. 174, a demurrer to a bill filed by the vendor for the specific performance of an agreement for the purchase of an annuity payable out of the dividends of stock standing in the name of the Accountant-General of the Court of Chancery, was overruled by Sir John Leach, V. C. "There can be no doubt," observed his Honor, "that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him, because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor:" and see *Clifford v. Turrell*, 1 Y. & C. C. C. 138; 9 Jur. 633.

And a court of equity will, on behalf of a vendor of life annuities, enforce specific performance of the contract, by compelling payment of the purchase-money, even after the death of the annuitant: at any rate, where there are arrears of the annuity due, sufficient to support a bill filed by the annuitant. It is true that a court of equity entertains a suit for specific performance by a purchaser in order to give him the very subject of his contract, nevertheless, although the demand of the vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. *Kenney v. Wexham*, 6 Madd. 355, 357.

In contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after a delay on the part of the plaintiff, and when the parties may be no longer in the same position. *Pollard v. Clayton*, 1 K. & J. 462.

And a court of equity will not only entertain suits for specific performances of contracts by vendors in ordinary cases where the price is named, but also where land has been taken by a railway company, and the price ascertained by a jury. See *Doherty v. Waterford and Limerick Railway Company*, 13 Ir. Eq. Rep. 538. "A legal remedy," said Lord Chancellor Brady, "exists to recover the money; but it is a fallacy to say that, because the plaintiff insists upon the specific performance of the contract—and that is the decree the

Court is called on to make—the parties *should go to law. There must exist mutuality; the company could file a bill to compel the transfer, and the plaintiff accordingly has the right to insist upon this specific performance of the contract.” [*649]

But although courts of equity, as we have seen, will not ordinarily decree specific performance of contracts to purchase chattels, if damages at law will be an adequate compensation; nevertheless, if a trust be created, the circumstance that the subject-matter to which the trust is attached is a personal chattel, will not prevent the Court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. *Pooley v. Budd*, 14 Beav. 34, 43, 44, per Sir J. Romilly, M. R. “For instance, if a man about to contract marriage, and possessed of a large and valuable quantity of iron, lead, or copper ore, assigned that ore to the trustees of the settlement, in trust to sell and convert the proceeds, and hold the proceeds when invested, upon the trusts of the settlement, there can be no question but that this Court would, before the sale, compel the possessor of the ore and the trustees of the settlement to fulfil every part of the trust, which one had undertaken to constitute, and the other had undertaken to execute.” *Ib.* p. 43.

So where a person had by agreement declared himself to be the trustee of stock for another person, with whose money it had been purchased, it was held, that the doctrine acted upon in the principal case was not applicable, and a transfer was compelled to the person beneficially entitled. *Stanton v. Percival*, 5 H. L. Cas. 257, 268.

In the case of *Doloret v. Rothschild*, 1 S. & S. 590, it was held by Sir John Leach, V. C., that a bill would lie for the specific performance of a contract for the purchase of Neapolitan stock, where it prayed for the delivery of the certificates which would constitute the plaintiff proprietor of a certain quantity of stock; “because,” said his Honor, “a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. I consider, also, that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract, and that, if he has any title, it must be in equity.” In *Duncuft v. Albrecht*, 12 Sim. 189, specific performance of a parol agreement for the sale of some railway shares was decreed by Sir L. Shadwell, V. C. “The only question,” observed his Honor, “is, whether there has been any *de- [*650]cision from whence you can extract a conclusion that the Court will not decree a specific performance of an agreement for the sale of such shares. Now, I agree that it has been long since decided, that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3½ per cents. or any other stock of that description, (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description, which railway

shares are limited in number, and which, as has been observed, are not always to be had in the market." This decision was, on the 23rd of July, 1841, affirmed by the Lord Chancellor. And see *Shaw v. Fisher*, 2 De G. & Sm. 11.

And where specific performance has been decreed of a contract to purchase railway shares, the Court will order the purchaser to pay the calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered. *Wynne v. Price*, 3 De G. & Sm. 310.

Where, however, a person, previous to the passing of the Act of Parliament authorizing a proposed railway, purchased some "scrip certificates," and upon payment of the purchase money, received and returned the certificates, though no particular contract was entered into upon the occasion, it was held by Lord Langdale, M. R., that after the Act had passed, the purchaser was not bound to take a transfer of the corresponding shares from the vendor, or to indemnify him from the amount of calls subsequently made. "This," said his Lordship, "is called a purchase of shares, when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law. There is not, in my opinion, any evidence of such an agreement as the plaintiff seeks to have specifically performed: and the bill must, therefore, be dismissed with costs." *Jackson v. Cocker*, 4 Beav. 66.

In the principal case, the Lord Chancellor lays it down as a general rule, "That the Court will not decree a specific performance of a contract when the party has not the thing to deliver." This was acted upon in a modern case, a bill having been filed against the provisional committee of a projected railway company for specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates; as there was no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements from which the *contrary might rather be inferred, Lord [*651] Cottenham, C., allowed a demurrer to the bill. *Columbine v. Chichester*, 2 Ph. 27. See *Pollard v. Claydon*, 1 K. & J. 475.

There is an exception to the ordinary rule of specific performance, when British ships, or shares in them, form the subject-matter of the contract; for it is clear that a court of equity will not enforce a contract for the purchase, either of a British ship, or shares in a British ship; inasmuch as, according to the policy of this country, both under the old Ship Registry Acts, (*Brewster v. Clarke*, 2 Mer. 75; *Thompson v. Leake*, 1 Madd. 39; *Newnham v. Graves*, ib. 399, n.; *Battersby v. Smyth*, 3 Madd. 110,) and under the Act now in force, (8 & 9 Vict. c. 89, ss. 34, 37; *Hughes v. Morris*, 2 De G. M. & G. 349, 357,) there can be no transfer of a ship in equity that is not a transfer at law.

And the provisions of the Ship Registry Acts apply equally to contracts and to sales, and the whole frame of these acts negative any equity resulting out of the doctrine of notice. Thus, in the recent case of *M'Calmont v. Rankin*, 2 De G. Mac. & G. 403, it was held by Lord St. Leonards, C., that an unregistered agreement as to the sale of the ship, entered into with the plain-

tiffs by the registered owner of the ship, who subsequently transferred it for value to another person having notice of the agreement, could not be enforced, either as against the ship or its proceeds. "It was contended before me," said his Lordship, "as it was in the case of *Hughes v. Morris*, (2 De G. Mac. & G. 349,) that the contract to transfer, as in ordinary cases in this Court, is equivalent to an actual transfer of the property, but the moment such a proposition is enunciated, it is obnoxious to the rule provided by the Ship Registry Acts, which destroys its effect both at law and in equity. I think, therefore, I am entirely precluded from giving any relief as regards the transfer of the ship itself.

"Then it has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule that parties cannot authorize a ship to be sold, and decree in what manner the money shall be applied. That is quite a different question. But the question before me is this: the plaintiffs claim the right under certain documents, which, they say, vest the property of the vessel in them, but for the Ship Registry Acts; and being forced to relinquish such right to the vessel, they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a court of equity is bound to give effect to that claim. *Can this Court give any relief as regards the proceeds of property which could not be given as against the property itself? [*652] There may be cases put, with regard to other transactions, in which the Court would follow the money, and would not follow the property, but I think the right to the money here must spring out of the right to the vessel. The right, if there was any right created, was to the vessel, for the consignment was of the vessel, and the vessel, by its proceeds, no doubt, was to pay its debts; but before effect was given to that inchoate right, before it ever ripened into a perfect contract,—and while it was pending,—the party, who was in the act of giving effect to it, chose to prevent it from becoming a legal and binding contract. If it does not become a legal binding act, how can equity fix upon the proceeds of property, which by law has not become liable, and which, in fact, legally belongs to somebody else? Suppose, for example, the defendants had now got the ship, and if, as is admitted, they would be entitled to retain her as long as she endures, or to make firewood of her, if they please, and the plaintiffs never could enforce their claim, it would be singular indeed, that though the property could be held in defiance of the rightful owner, and that no equity existed as regarded the property so long as it was kept in specie, yet that the moment that property was converted into money, the money might be demanded by the plaintiffs. What is that but indirectly breaking in upon the provisions of the Ship Registry Acts, and giving the plaintiffs a right or property in the vessel, though they cannot have the vessel itself? These Acts intended that the property in the vessel should go hand in hand with the right to the vessel, and that he who had the vessel should also have an equitable right to the property in the vessel. The cases, if it were necessary to go into them, would prove that. My clear opinion, therefore, is, that the property in

this ship did not pass to the plaintiffs, while it was in specie, and that being so, that the contract under the documents which have been produced does not give them the title which they now assert to the proceeds of that property."

The policy, however, of the Ship Registry Acts is not, in all cases, applicable to contracts relative to the *proceeds* arising from the sale of ships, and to the produce of freight. Thus, in *Armstrong v. Armstrong*, 21 Beav. 78, shares in a British ship, purchased with his father's money, were registered in the name of the defendant, Armstrong. After the father's death, the defendant, Armstrong, entered into an agreement with his representatives, admitting their right, and, for valuable consideration, agreeing to sell the shares [*653] at the end of twelve months, and to account to the representatives for the proceeds. The ship was accordingly sold. It was held by Sir John Romilly, M. R., that, although the Ship Registry Acts prevented the representatives enforcing any right against the ship itself; still that they were entitled to recover the proceeds of the sale in the hands of the purchaser. "My opinion," said his Honor, "is, that the agreement here does not give any interest in the ship, but is an agreement that at the expiration of the period mentioned, the defendant Armstrong is to sell the shares and pay over the proceeds thereof according to the will of his father. That is exactly what Lord St. Leonards says in *M'Calmont v. Rankin*, 2 De G. Mac. & G. 424. I do not lay down any rule that parties cannot authorize a ship to be sold, and direct in what manner the money shall be applied. . . . The result, is that, in my opinion, this is an agreement which is binding on the defendant Armstrong, that it is capable of being enforced in this Court, and that the money arising from the sale of the ship being now available, he is bound to account for it in the manner provided by this agreement." See and consider *Coombes v. Mansfield*, 3 Drew. 193; *Clarke v. Batters*, 1 K. & J. 242.

The Court has frequently stated that fraud might warrant its interference, but there is no case in the books in which the particular fraud which would create an interest in a ship has occurred. *M'Calmont v. Rankin*, 2 De G. Mac. & G. 416; *Armstrong v. Armstrong*, 21 Beav. 71, 87.

It has recently been decided at law, that an action will not lie for the breach of an *executory* contract for the sale or transfer of a ship, unless the contract contains a recital of the certificate of registry, pursuant to the 8 & 9 Vict. c. 89, s. 34: *Duncan v. Tindal*, 13 C. B. 258.

The specific performance of contracts, belongs, rather, to the extraordinary jurisdiction of the Court of Chancery. It is not a matter of course, in all cases. It rests upon a sound, judicial discretion; *Blackwelder v. Loveless*, 21 Ala. 371; *Palmer v. Graham*,

1 Parson's Eq. 476. It is not given because there is no remedy at all at law; for there is always at law a remedy in damages for the breach of a contract. It is given because the legal remedy of damages is, in certain cases, not a complete remedy; and, of course,

it is confined to those cases where a compensation in money is not adequate, or not practicable: see *Seymour v. Delancey*, 3 Cowen, 446, 505.

There are two grounds upon which a court of equity decrees specific execution of contracts, on account of damages at law being an insufficient remedy. 1. One of these is where there is something particular and specific in the subject of the contract, which cannot be at all represented by damages. 2. The other is, where the measure of damages at law is uncertain or unascertainable, owing to the contingent nature of the property, so that the only method of giving the purchaser the exact value of his purchase, is to give him the thing itself. The first of these exists, where it is apparent that the object contemplated by the purchaser was, not a general profit, which could be represented by money, but some special, peculiar purpose of use or enjoyment, which could be satisfied only by having the individual thing itself for which he had bargained; *Kirksey v. Fike*, 27 Alabama, 383: see *Neilly v. The Merchant's Insurance Company*, 19 Ohio, 452. In these cases, there is something in the contract for which the law does not profess to give a remedy; for its damages are based upon the general value of the article, and not on the special value which it has for the purchaser under all the circumstances of the case. Accordingly, on this ground, contracts for real estate will generally be decreed, because there is something specific in every piece of land, as, situation, title, &c.; and a contract for the sale of a chattel which has something peculiar and individual in its nature, as, a family picture, or

relic, may be decreed; but a contract for a chattel not specific or individual, but merely answering a general description, as, so much merchandise or stock, is not decreed by a court of chancery; for the law gives what was the substantial object of the parties in entering into the contract, viz: a money profit; *Ferguson v. Paschall*, 11 Missouri, 267. 2. The other ground is the uncertain measure of damages at law, or rather the impossibility of ascertaining the real damages; which exists in regard to certain special contracts; *Woodward v. Aspinwall*, 3 Sandford's S. C. 272; *Summers v. Bean*, 13 Grattan, 404, 419. [The principles which pervade and govern this branch of equitable jurisdiction, are the same, whether real or personal property is in question, the only difference being, that while contracts for the conveyance of land fall, *prima facie*, within their operation, the presumption is the other way with regard to chattels, and equity will not intervene unless there are some special circumstances which render its assistance necessary to the ends of justice; *Dalzell v. Crawford*, 1 Parson's Eq. 37, 42; *The Mechanic's Bank v. Seton*, 1 Peters, 299; *Kirksey v. Fike*, 27 Alabama, 283; *Summers v. Bean*, 13 Grattan, 404, 411. When, however, the case is in other respects proper for relief, it will be given whether the wrong is a tort or a mere breach of contract, especially if the wrong is aggravated by a breach of trust or confidence; and in *M^r Gowin v. Remington*, 2 Jones, 56, the Supreme Court of Pennsylvania decreed the specific restitution of drafts, maps, plans, and other valuable private papers which had been taken

possession of by a clerk during the absence of his employer, and wrongfully withheld after he returned.]

The general principle is well settled in this country, that a court of chancery does not interfere to enforce specific performance of contracts relating to chattels, because chattels generally are not specific in the sense here meant, and one article of the same character serves as well as another: *Caldwell, &c. v. Meyers and Wife*, Hardin, 551; (see, however, *Meriwether v. Booker and Wife*, 5 Little, 254;) *Madison v. Chinn*, 3 J. J. Marshall, 230; *Dalzell v. Crawford*, 2 Pennsylvania Law Journal, 17, 19; *Ins. Co. of N. A. v. Union Canal Co. et al.*, Ib. 65, 67; *Savary v. Spence*, 13 Alabama, 561; *Babur v. Babur*, 24 Maine, 42; *The Justices v. Croft*, 18 Georgia, 473; *Roundtree v. Mc Lain*, 4 Hempstead, 245. "It is a general rule," said the chancellor, in *Hoy v. Hansborough et al.*, 1 Freeman's Chancery, 533, 543, "that a court of equity will not decree a specific performance of a mere personal covenant sounding in damages, nor of a contract relating to personalty, where compensation may be had at law." "It is contended," said Daggett, C. J., in *Cowles v. Whitman*, 10 Connecticut, 121, 124, "that a bill will not lie for the specific execution of a contract relating to personal chattels merely, because there is an adequate remedy at law; and for this position several cases are cited, and many more might be cited. As a general rule, it is true. As contracts for the delivery of corn, flour, stock in banks or in the funds, and the like, may be compensated in damages, courts of equity will leave the parties to their remedy at law: *Buxton v. Lister et al.*, 3 Atk. 383;

2 Swift's Digest, 17. There can be no difference between these five shares of bank stock and any other like number." "It is the common course of the court," said Dessausure, C., in *Brown v. Gilliland*, 3 Dessausure, 539, 541, "to decree the specific execution of contracts respecting real estates; and it is equally the settled course of the court to refuse to decree the specific execution of contracts, as to some kinds of personal chattels, particularly stock. Some exceptions have been made as to some special kinds of personal chattel, under peculiar circumstances." [And when a mail contractor sought to compel a plank road company, to permit the execution of an agreement for the transportation of the mail over their road, a decree was refused on the ground, that the bill disclosed no sufficient reason for believing that an adequate compensation could not be obtained by a suit for damages at law; *Powel v. Central Plank Road Company*, 24 Alabama, 441.]

That the court, however, will decree specific performance of personal contracts, in those exceptional cases, which fall within the reasons upon which the practice of enforcing contracts relating to real estate rests, namely, that compensation in damages would be inadequate, is also an established principle in this country. "Notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule," said Thompson, J., in delivering the opinion of the court in *The Mechanic's Bank of Alexandria v. Seton*, 1 Peters, 300, 305, "yet there are many cases to be found where specific performance of contracts, re-

lating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, contracts of this description, than such as relate to lands." [Where, therefore, no redress against a manifest wrong can be had at law, or when redress would, from any cause, be inadequate, relief will be given in equity, whether lands or chattels are in question, the want or failure of a sufficient legal remedy being, in this, as in most other cases, sufficient to warrant the interference of chancery. Hence, when the part execution of an antenuptial contract with reference to chattels or *choses in action*, which is invalid under the Statute of Frauds, for want of a writing, has given rise to an equity which the law cannot enforce effectually, a specific performance will be decreed for the same reasons, which apply when oral agreements for the sale of real estate are in question; *Gough v. Crane*, 3 Maryland Chancery, 119; 4 Maryland, 311. And when the stock of a bank is held by a trustee, equity will interfere for the purpose of defeating an attempt to set up a lien at variance with the trust, for a loan made to the trustee with full notice of his fiduciary character, by compelling the bank to permit a transfer of the stock to the *cestui que trust*, or those claiming under him; *The Mechanic's Bank v. Seton*, 1 Peters, 299. In like manner, a provision in a contract for the sale of the goodwill of a business, that the purchaser shall, in default of payment, return the business in the same state in which it was when purchased, will be specifically enforced by enjoining him from prosecuting the business on his own account, and thus drawing off the customers of the vendor; *Pal-*

mer v. Graham, 1 Parson's Eq. 476; and a similar course will be taken with reference to an agreement to insure; *Carpenter v. The Mutual S. Ins. Co.*, 4 Sandford's Chancery, 408; because neither case affords an adequate measure or standard of damages, and damages might prove inadequate for compensation. And it has been held, that equity will compel the delivery up of bonds, notes, and other documentary evidences of debt; *Gough v. Crane*, 3 Maryland Chancery, 119; at all events, where the question arises between the representatives of a deceased wife and the husband, and involves equitable considerations; for it would seem plain that a bill in equity cannot be made a substitute for trover or replevin, unless on special grounds or under very peculiar circumstances. The wrongful detention or asportation of chattels, which are of peculiar value to the owner, may, however, give a right to the aid of chancery, to compel their restitution; and it was held in *M'Gowin v. Renington*, 2 Jones, 56, that when part of the property, withheld by an agent, falls within this principle, the decree should extend to the whole, and thus avoid the evils incident to bringing the same wrong before two different tribunals.]

The jurisdiction of equity to compel a specific performance, was carefully considered in *Chamberlaine v. Blue*, 6 Blackford, 491, 492, where the court held the following language: "As a general rule, a court of chancery will not interfere where a contract sounds only in damages. There are cases, however, where on contracts sounding in damages only, a court of chancery will exercise its jurisdiction. As, for example, where there was a contract for the sale of a large quan-

tity of iron to be paid for in a certain number of years by instalments, a specific performance was decreed, 3 Atk. 384; *Adderley v. Dixon*, 1 Sim. & Stu. 607. And in *Buxton v. Lister*, 3 Atk. 383, which was a bill for the specific performance of a contract for the delivery of certain timber at specified periods, Lord Hardwicke held that a court of equity could grant relief in such a case, though in that case the bill was dismissed on account of fraud in the vendor. The exercise of this jurisdiction, however, is limited to cases where a compensation in damages would not afford a full, complete, and satisfactory remedy. Courts of equity will also, in many cases, decree the specific execution of personal contracts, where injury is apprehended but not yet sustained." In that case, it was held that a court of equity may decree specific performance of a general covenant to indemnify; but an opposite decision was given in *Hoy v. Handsborough et al.*, 1 Freeman's Chancery, 533.

In *Phillips v. Berger*, 2 Barbour's S. Ct. 609—affirmed 8 Id. 527—it was determined that a bill could be sustained for specific performance of an agreement to compromise a judgment debt, by receiving a promissory note of a third person for a portion of the amount. And Edmonds, J., in that case, said: "The jurisdiction of this court, in compelling a specific performance of contracts relating to lands, is pretty well settled; but not so in regard to personal contracts—that is, contracts for personal acts, or for the sale and delivery of personal property. The reason for the distinction between the two classes of contracts has long since past away. Yet, the distinction, still, in a great measure,

remains. Judge Story, with great propriety, in his Commentaries on equity jurisprudence, remarks, that there is no reasonable objection to allowing the party who is injured by the breach to have an election either to take damages at law, or to have a specific performance in equity. The courts have not yet gone that length; but when they do, they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence many of the artificial distinctions to which the courts have been compelled to have recourse, in order to justify their advance toward such a sound general rule. The rule in regard to personal contracts yet falls short of that, and is extended only to cases where the party wants the thing in specie, and he cannot otherwise be compensated; that is, where an award of damages would not put him in a situation as beneficial as if the agreement were specifically performed. Or, where the compensation in damages would fall short of the redress which his situation might require. The general rule is, not to entertain jurisdiction to decree a specific performance respecting goods, chattels, stocks, *choses in action*, and other things of a mere personal nature; but the rule is qualified, and is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy."

[Similar ground was taken in *Very v. Levy*, 13 Howard, 345, and an agreement by a creditor to receive such goods as he might select, in payment of the debt, under which part of the goods had been delivered, carried into full execution by a decree that a master should select and deliver the residue of the goods in final satisfaction,

in case the creditor refused to select them himself; the court holding that although an accord is not binding, at law, without satisfaction, it may yet be specifically enforced by equity. Another illustration of the same general principle may be found in *Kirksey v. Fike*, 27 Ala. 283, where an award dividing vats and hides, which formed the assets of a partnership, equally between the partners, was enforced specifically on the ground that the principle was the same whether lands or chattels were in question, and that a specific performance should be decreed, whenever compensation in damages would manifestly be inadequate to the purposes of justice. It seems, moreover to have been thought, in this case, and in *Clark v. Flint*, 22 Pick. 231, that the insolvency of a party who withholds a chattel, may form a reason why equity should decree its restitution, instead of remitting the complainant to an action at law. And when A. and B. agreed that A. should furnish a large quantity of peach trees, and that B. should plant them on his farm, send the fruit to market, and render an account of the profits, and A. furnished the trees in pursuance of the contract, equity enforced the agreement specifically at the suit of A. and those claiming under him, by assignment; *M'Knight v. Robbins*, 229, 642: while in *Fishe v. Johnson*, 2 Jones' Eq. 149, stock in a railroad company was said to stand on a different footing, in this country, from government stock in England, and to have a specific value, which made it a proper subject for a decree of specific performance.]

Where a trust has been created, in relation to particular chattels, by contract, there is no doubt that a bill

in equity will lie to enforce the trust, and have a transfer of the property; *Ferguson v. Paschell*, 11 Missouri, 267. *Cowles v. Whitman*, 10 Connecticut, 121, 125, was the case of a trust in bank shares; and *Clark v. Flint*, 22 Pickering, 231, 239, rests upon a similar principle. It was there held that, where the owner of a brig had contracted in writing, for a valuable consideration, to hold the vessel in trust for another, and subject to his order and disposition, and had then sold her to another person with notice of the contract, specific performance might be enforced, in case of the insolvency of the original contractor, since a judgment at law against an insolvent person would be not an adequate remedy. "It is objected," said Wilde, J., in delivering judgment, "that the court ought not to exercise jurisdiction in equity for a specific performance of agreements relating to personal property. And generally, that rule has been observed in the English courts, but has been subject to numerous exceptions, and has been uniformly limited to cases where a compensation in damages furnishes a clear and adequate remedy. If the party complaining has no such remedy, it is quite immaterial whether the contract relates to real or personal estate: 2 Story on Eq. 24. The exercise of equity jurisdiction does not proceed upon any distinction between real estate and personal estate; but because damages at law may not in the particular case afford a complete remedy.

"This doctrine is thus laid down by Judge Story in his Commentaries, and is fully sustained by the cases cited in support of it. The reasons given for a distinction between real

estate and personal estate are not very satisfactory. All, as it seems to me, that can be fairly inferred from the cases on this point is, that in contracts respecting personal estate a compensation in damages is much oftener a complete and satisfactory remedy, than it is in those which relate to real estate. But in all cases, if the party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require."

In the southern States of this Union, numerous cases have arisen in regard to slaves, who are regarded by the law as property, but in many instances are property of the most specific kind. The discussions which have taken place on this subject are well adapted to discover the true grounds upon which equity enforces, or refuses to enforce a personal contract.

In South Carolina, in the earlier cases, it was held to be a general rule, that Chancery did not enforce specific execution of contracts relating to personal property, and that the circumstance that slaves were the subjects of the contract, did not create an exception: *Farley v. Farley*, 1 M'Cord's Chancery, 506, 516. Subsequently, in the case of *Sarter and Wife and others v. Gordon, Adm'r*, 2 Hill's Chancery, 121, the considerations which give to domestic slaves a specific character and an individual value, in relation to their owner, were brought fully into view, and it was decided, that, as a general rule, a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of lands, but that there might be exceptions to the rule; if it appeared that the purchaser contracted for the slaves as merchandise to sell again, this according to the ex-

pression in *Buxton v. Lister*, would be merely a matter in the way of trade, and in such a case, complete justice might be done by a compensation in damages. Shortly after, in *Horry and Trapier, Trustees, v. Glover and others*, 1 Id. 515, 525, the rule was laid down as follows: "that if a man's slave has come into the possession of another who refuses to deliver him, or if he has contracted for specific slaves, he has a right to a specific delivery: But if the contrary appears—that he contracted for slaves generally, with no view to any particular individuals, or if they were contracted for as merchandise, to sell again, the remedy is at law." In *Young v. Burton*, 1 M'Mullan's Equity, 256, the subject was again discussed in the Court of Errors, and the reader is specially referred to that case, as containing a thorough and able exposition of the distinctions in relation to the specific execution of personal contracts. The rule was there propounded: "First, that a bill will lie for the specific delivery of slaves, generally, which are withheld from the possession of the rightful owner. Second, that it is sufficient to give jurisdiction to the court, to state, in such bill, that the slaves are the property of the complainant, and that their possession is withheld by the defendant." See, also, *Bobo v. Grimke & Martin*, Ib. 304, 310; *Fraser v. M'Clenachan*, 2 Richardson's Equity, 79, 84; *Ellis v. Commander*, 1 Strobhart's Equity, 188, 190. In the late case, however, of *Bryan & Richardson v. Robert*, Ib. 335, 341, the limits of equity jurisdiction on this subject were more specially and precisely defined, and the generality of the previous rule, per-

haps, somewhat qualified. In that case, a slave had been sold, and a mortgage upon him taken for the purchase-money, and he had again passed through the hands of several vendees; the sureties of the original mortgagor then paid the debt, and took an assignment of the mortgage, and sought to recover the slave. "I think," said Harper, C., "there is a misconception in supposing this a case in which a bill will lie for the specific delivery of a slave. The general principle on which such a bill may be sustained, as determined by the cases of *Sarter v. Gordon*, *Trapier v. Glover*, and *Young v. Burton*, rests on these grounds: that where an owner has had possession of a slave, and he has been deprived of it by the act of another, the general presumption is, that there may be some qualities in the slave which would render him of more value to the owner than could be compensated by the price of such a slave, estimated at his mere market value. So, where a party contracts for the purchase of specific slaves, it is presumed that he may have made his contract with a view to some particular qualities in the slaves themselves, for which ordinary damages would not be a sufficient compensation. Or, as in *Trapier v. Glover*, when one is entitled to slaves, by the gift or limitation of a friend, relation, or ancestor, there is very sufficient reason why he should have the slaves themselves, instead of any damages for their estimated value. A general expression is used in one of the cases, that where a party states a defendant to be in possession of his slave, he states a case entitling him, *prima facie*, to the interference of this court. And so it is, but it must be taken with

the qualifications I have suggested from the context of the cases. An exception is made in the cases, when it appears that, without any view to peculiar qualities, there is a contract for slaves, to be sold again as merchandise.

"The same reason applies, and more strongly, in the case of a mortgagee of slaves. He is not supposed to know anything of the peculiar qualities of the slaves, except that he might form an estimate of the market value of such slaves, and certainly not to have the same attachment, or knowledge of their character and qualifications, as the owner, who has been in possession of them, and has been deprived of it. In this court, the mortgagee, though having the legal title, is not considered, in any manner, as the owner of the slaves; as, in a court of equity, in England, the mortgagee of land is not considered the owner. He is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself. His object is merely the recovery of his money."

In Alabama, principles quite the same with those thus defined by Mr. Chancellor Harper, are laid down in *Savery v. Spence*, 13 Alabama, 561, 564, which related to a contract about slaves, which clearly involved pecuniary considerations only. "A court of equity," said Dargan, J., "will not decree a specific execution of a contract in reference to personal property, when compensation for the breach of the contract in damages, furnishes a complete and satisfactory remedy. See 2 Story's Eq. 26. A court of equity will, in some instances, interpose, and decree a specific performance of a contract, in refer-

ence to personal property; but then it must be shown, that a court of law cannot give full and complete redress by compensation in damages, for a breach of the contract, either from the nature of the contract itself, or from the peculiar character of the subject-matter of the contract, neither of which is shown in the present case, and therefore, the complainant should be remitted to a court of law, which is fully competent to give redress in this case, if there has been a violation of the terms of any contract in reference to the slaves."

In Mississippi, in the case of *Murphy v. Clark*, 1 Smedes & Marshall, 221, 232, a bill was filed for the specific delivery of slaves, and the objection to the jurisdiction was urged, that there was an ample and complete remedy at law, and that the bill did "not disclose those circumstances which are necessary to authorize the interposition of equity, or in the technical phrase of the books, the *pretium affectionis* was not set forth." Mr. Justice Clayton, after an examination of the authorities, said, that the cases, to his apprehension, established the principle, "that wherever the bill states circumstances, from which the court may fairly infer that the owner prefers the property in specie to damages, and that this preference is of a character which it is not unreasonable to indulge, and exists in reference to property for which damages at law might not be a full compensation, equity will entertain jurisdiction." The point was not considered as judicially settled by this case, and came up again in *Butler v. Hicks et al.*, 11 Id. 79, 85, where a majority of the court affirmed the principle of *Murphy v. Clark*; but Sharkey, C. J., dis-

sented, or qualified his assent, as to the general principle. "I cannot concur in holding," he said, "that the owner of slaves may, under any and all circumstances, resort to the court of chancery for the recovery of his property. Slaves are regarded as property; the title to property is triable at law, unless there be some peculiar circumstances to give a court of chancery jurisdiction. I do not think this mere character of the property carries with it, necessarily, the *pretium affectionis*, which has usually been held necessary to give the court of chancery jurisdiction to decree the specific property to the master. A slave, from peculiar abilities or habits, might be worth greatly more to his master than he would be to any other person, and in such cases, the jurisdiction might well be exercised."

The same subject was discussed in an interesting manner, in *Dudley v. Mallery*, 4 Georgia, 52, 65. "His Honor, the presiding judge," said Lumpkin, J., in delivering the opinion of the Supreme Court, in error, "held, in accordance with the recent South Carolina cases, that a bill well lies in a court of equity for the specific delivery of slaves, which are withheld from the possession of the rightful owner, and that it is sufficient to give jurisdiction to the court, to state, in such bills, that the slaves are the property of the complainant, and that their possession is withheld by the defendant."

"We yield our unqualified approval of the motive which has prompted these adjudications, namely, humanity to the slave, the interest of the owner, and a just regard to the ties which bind the master and slave together. Those who are acquainted

with this institution, know, that the master and slave form one family, or social compact, being usually reared together on the same lot or plantation, and feeling toward each other the kindest sympathies of our nature.

. . . Instead of weakening, our desire is to maintain and promote this mutual attachment and goodwill. But we cannot, for the very reasons assigned in these cases, go to the extent of holding that it is sufficient merely to allege in the bill, that the slaves sought to be recovered, are the property of the complainant, and withheld by the defendant. In many, I am prepared to say from my own experience, in a majority of the suits instituted for the recovery of slaves, humanity to both races requires that there should not be a *specific delivery*. . . .

"Female slaves are sometimes pledged for the payment of loaned money, and the borrower returns after the lapse of many years, tenders payment and claims the right to redeem his property, which has multiplied to a numerous family; here, as it often happens, the best feelings of our nature are opposed to the legal or equitable right.

"Slaves, then, being by our law, chattels, we think it best, that as a general rule, chancery should not entertain a bill for their specific delivery. And that to give jurisdiction, it is necessary to charge and prove peculiar circumstances—as, that they are family servants, a carpenter, blacksmith, wagoner, hostler, &c. This will give the defendant an opportunity of stating in his answer the peculiar circumstances connected with his possession; and the special jury, under the direction of the chancellor, will

constitute a fit and proper tribunal, to pass upon the peculiar features of each case, and to decree either a specific delivery of the property, or its equivalent in money.

"And this is in conformity with the practice of the English courts, from which ours is derived. There, a bill will not lie for the specific recovery of chattels, unless where the remedy at law by damages, would be utterly inadequate, and leave the injured party in a state of irremediable loss. In all such cases, courts of equity will interfere, and grant full relief by requiring a specific delivery of the thing which is wrongfully withheld; 2 Stor. Eq. Jur. § 709.

"Thus, where the lord of the manor was entitled to an old altar piece, made of silver, and remarkable for a Greek inscription, and dedication to Hercules, it was decreed to be delivered up as a matter of curious antiquity which could not be replaced in value; *Somerset v. Cookson*, 3 P. Wms. 390. So, where an estate was held by the tenure of a horn, and a bill was brought to have it delivered up, it was held maintainable; for it constituted an essential muniment of his title; *Pusey v. Pusey*, 1 Vernon, 273. The same principle applies to any other chattel, whose principal value consists in its antiquity; or in its being the production of some distinguished artist; or in being a family relic or ornament, or heir-loom; such, for instance, as ancient gems, medals, and coins; ancient statues and busts; paintings of old and distinguished masters; and even those of modern date, having a peculiar distinction and value, such as family pictures and portraits and ornaments, and other things of a kindred nature."

In North Carolina, in the case of *Williams v. Howard*, 3 Murphy, 74, 80, 81, though the point was not considered as necessarily arising, the judges expressed their opinions upon it. "I have no hesitation in giving it as my decided opinion," said Taylor, C. J., "that the reason of the rule in relation to the specific execution of contracts relating to chattels, does not apply to slaves; that they form an exception, for reasons equally cogent, or more so, than those applicable to land. With respect to other chattel property, justice may be done at law, by damages for non-performance, and therefore equity will not interpose: but for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." "All the principles," said Henderson, J., in the same case, "which induce a court of equity to compel the specific execution of a contract for the sale of lands, or some favorite personal chattel, apply with equal, if not stronger force, to the case of slaves." [These principles have been applied in a number of other instances, and are generally recognized in the southern States of the Union; *Pasley v. Martin*, 5 Richardson's Equity, 351; *Reese v. Holmes*, Ib. 531; *Leftin v. Erspy*, 4 Yerger, 84, 92; *Henderson v. Vaux*, 10 Id. 30, 37; *Summers v. Bean*, 13 Grat-tan, 404.

Equity will compel the execution of an award, whenever its own nature, or that of the subject-matter to which it relates, is such that it cannot be carried into execution without some specific action, by one or both of the

parties, which could not be enforced in a court of law; as when the title to land is in question, and the arbitrators decide that the title is in one of the parties, or that the other shall execute a release or conveyance; *Wood v. Shepherd*, 4 Patton & Heath, 442; *M'Neill v. Magee*, 5 Mason, 245; *Somerville v. Freeman*, 4 Harris & M'Henry, 45; *Jones v. The Boston Mill Corporation*, 4 Pick. 507, or where the award is for the delivery of specific chattels, and the case is one in which no adequate remedy could be had by a suit for damages; *Kirksey v. Fike*, 27 Ala. 383; *Story v. The Railroad*, 24 Conn. 94; and, in general, whenever the circumstances are such that equity would lend its aid, if the obligation grew out of contract, and not from an award. Hence, when an award is legally invalid or ineffectual, in consequence of some mistake or omission, which does not reach its substance, equity will intervene and enforce its execution; *Bouck v. Wilber*, 4 Johnson's Chancery, 405; *Bays v. Eberhardt*, 3 Michigan, 544; *Cook v. Vich*, 2 Howard, 882.

Equity will not enforce an agreement to refer existing disputes to arbitrators; *Conner v. Drake*, 1 Ohio, N. S. 166; *Tobey v. The County of Bristol*, 3 Story, 800, 820, 823; because such an agreement is, in effect, a mere power, and consequently revocable, and because the policy of the law will not permit the courts to be ousted of their jurisdiction; *Toby v. Bristol*, 3 Story's Equity, sect. 1457. Both these reasons, however, are somewhat questionable, a power coupled with an interest being irrevocable; 1 American Leading Cases, 578; 2 Id. 738; and legal policy no longer forbidding agreements to substitute a tribu-

nal chosen by the parties for those provided by the legislature or constitution; *Livingston v. Rolle*, 5 Ellis & Blackburne, 132: and in *M'Gheehen v. Duffield*, 5 Barr, 497, the court went on the principle, that when a countermand of a submission would be inequitable, equity will uphold and enforce the award in spite of a prior revocation.

There are a number of contracts which cannot be made the subject of a decree for specific performance, in consequence of the impossibility of carrying the decree into effect when made, without an inquisitorial and oppressive exercise of authority. Hence an engagement to sing or act at the theatre, or other place of public amusement, will not be compulsorily enforced in specie, because it would answer no good end to bring the performer on to the stage, unless he could also be compelled to display his talents or use his voice with effect when there; *Sanquirice v. Benedetti*, 1 Barbour, 365. The same reason applies to most other agreements for personal efforts or services; *Haight v. Badgely*, 15 Id. 501.

It seems that chancery will, under some circumstances, enforce the specific performance of an agreement for the formation or continuance of a partnership; Story's Eq. Jurisprudence, § 722; *Wilson v. Campbell*, 5 Gilman, 383; but the power is open to many objections, and certainly will not be put forth in any case when its exercise would be inequitable, or where a sufficient remedy could be had at law; *Wadsworth v. Manning*, 4 Maryland, 59; *Reid v. Vidal*, 5 Richardson's Equity, 289. Nor will equity, in general, compel parties who have sub-

scribed to the stock of a railroad, to fulfil their engagement, but will leave the company to their remedy in damages at law; *The Strasburgh Railroad Co. v. Echternacht*, 9 Harris, 220: although, when a complainant had subscribed for stock, on the faith of a promise by the defendants to diminish the burden by taking a large portion of the amount subscribed, he was held entitled to a decree for specific performance; *Austin v. Gillespie*, 1 Jones' Equity, 261.

The rule that equity will not enforce contracts relating to chattels or other personal property, specifically, ceases to be applicable when the parties stipulate expressly or by implication for a specific interest in the nature of a lien or security, and when the object which they have in view, consequently, cannot be attained by remitting them to an action *in personam* for damages, without a guaranty for the payment of the amount recovered. Hence, nothing is better settled than that contracts for the specific appropriation of a fund or chattel, as payment or security for a debt, will be viewed in equity as actual assignments and not as mere promises to assign, and specifically enforced as such between the contending parties and those claiming under them as creditors or purchasers; *Sullivan v. Bowie*, 1 Maryland Ch. 59; *Trebert v. Burgess*, 11 Maryland, 452. The rule was so held in *Shockley v. Davis*, 17 Georgia, 177; *Buck v. Swazey*, 35 Maine, 41; *Alexander v. Ghiselin*, 5 Gill, 138; and *Triebert v. Burgess*, 11 Maryland, 452, 464; and has been applied in a number of other instances, many of which will be found collected in the note to *Rowe v. Dawson*, *post*, vol. 2, part 2d. In like manner,

when a grant or mortgage is made of freight which has not yet been earned, or of goods and chattels before they are acquired, equity will view the transaction as a contract, and give it effect by a decree for specific performance; *Mitchell v. Winslow*, 2 Story, 630; because there is no adequate remedy at law, and the plain intent of the transaction would fail without the assistance of chancery. Equity will, moreover, intervene whenever its aid is necessary to give effect to the assignment of a contract or *chose in action*, because contracts of that nature cannot be made the subject of a legal transfer, and consequently fall more peculiarly within the jurisdiction of chancery; *Woodward v. Aspinwall*, 3 Sanford's S. Ct. 272; *Field v. The Mayor of New York*, 2 Selden, 179; and the same course will be adopted

when a contract has resulted in the creation of an equitable lien; *Ash v. Johnson*, 2 Jones' Equity, 149.

Equity will not, under ordinary circumstances, interfere to compel the performance of an accord while still executory, or which has not been so far executed as to be binding in law as a satisfaction, even when it takes the form of an agreement by a number of creditors, to receive part of the debt in payment of the whole; *Acker v. Phoenix*, 4 Paige, 305. When, however, an accord has been so far executed by one party that it would be inequitable to permit the other to defeat it by a refusal to accept the performance of the residue, chancery may give the whole effect by a decree for specific performance; *Very v. Levy*, 13 Howard, 145.

SPECIFIC DELIVERY UP OF CHATTELS.

[*654]

PUSEY *v.* PUSEY.

DE TERM. S. MICH. NOVEMBER 20, 1684.

REPORTED 1 VERN. 273.¹

SPECIFIC DELIVERY UP OF CHATTELS.]—*Land held by the tenure of a horn. Bill brought by the heir for the horn.*

BILL was, that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz., *pecote this horne to hold huy thy land.*²

The defendant answered as to part, and demurred as to the other part; and the demurrer was, that the plaintiff did not by his bill pretend to be entitled to this *horn*, either as executor or devisee; nor had he in his bill charged it to be an *heir-loome*.

¹ Reg. Lib. 1684, B., fol. 310.

² Camden, speaking of the manor of Pusey, says, "the family of Pusey still hold it by a horn, anciently given to their ancestors by Canute, the Danish King." (Camd.

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the Lord Keeper Guildford was of opinion, that if the land was held by the tenure of a *horn* or *cornage*, the heir would be well entitled to the horn at law. Vide 1 Inst. 107, a.

*DUKE OF SOMERSET v. COOKSON. [*655]

DE TERM. S. MICH. 1735.

REPORTED 3 P. WMS. 389.¹

SPECIFIC DELIVERY UP OF CHATTELS.]—*A bill lies to compel the delivery of an altar-piece, or other curiosity, in specie.*

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland, (part of the estate of the Piercys, late earls of Northumberland, was entitled to an old altar-piece made of silver, remarkable for a Greek inscription, and dedicated to Hercules. His Grace became entitled to it as treasure-trove within his said manor.

This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith, at Newcastle, but who had notice of the duke's claim thereto.

The duke brought a bill in equity, to compel the delivery of this altar-piece *in specie undefaced*.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true for writings savoring of the realty a bill would lie, but not for anything merely personal² any more than it would for a horse or a cow. So a bill might lie for an heir-loom, as in the case of *Pusey v. Pusey*, 1 Vern. 273; and, though in trover the plaintiff could have only damages, yet in detinue, the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

Brit. Berks. p. 203, ed. 1607.) Dr. Hicks gives the inscription as follows (see Thes. Præf. p. xxv.):—

“I Kyng Knowd geve Wylyyam Pecote
Thys horne to hold by thy lond.”

The name “Pecote,” however, seems to be a mistake, and should be written “Pewse.” The real inscription runs thus:—

“Kyng Knowd geve Wylyyam Pewse
This horne to hold by thy lond.”

Archæologia, vol. iii. pp. 13, 14.

¹ 2 Eq. Ca. Abr. 164, pl. 28.

² Cud v. Rutter, 1 P. Wms. 570; ante p. 640, nom. Cuddee v. Rutter; Colt v. Netterville, 2 P. Wms. 304.

On the other side, it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it *would be very hard that one who comes by such a [*656] piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity, or ornament, nolens volens. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself, nothing can be more reasonable, than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie*; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly [by Lord Chancellor Talbot.]

Since the decision in the cases of *Pusey v. Pusey*, and *The Duke of Somerset v. Cookson*, it has always been admitted, as undoubtedly within the jurisdiction of a court of equity, specifically to compel the delivery up of heir-looms, or chattels of *peculiar value* to the owner, although the heir-looms or chattels, if they could be found, might be recovered in an action of detinue, or their value in an action of trover. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced—viz., that the specific thing is the object, and damages will not afford an adequate compensation.

"The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without [*657] being liable to the estimate of *people who have not his feelings upon it."—Per Lord Loughborough, C., in *Fells v. Read*, 3 Ves. 71. In *Saville v. Tankred*, 1 Ves. 101, Belts's Suppl. 70, upon a bill being filed by the representatives of a Mr. Saville, the pawnee of a strong-box containing jewels, Lord Hardwicke ordered it to be delivered up to him, although it was objected that the representatives of the Duke of Devonshire, to whom it belonged, ought to have been made a party. "The pawnee of a pledge," observed his Lordship, "as Saville was, may bring trover or detinue at law for it, without troubling himself with the pawner, for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another, that person has nothing to do with the duke. Therefore, let these jewels come into his hands which way they will, he may give

the custody of them to any one, and have them back without hurting the duke or his representative:" and see *Lloyd v. Loaring*, 6 Ves. 773; *Pearne v. Lisle*, Amb. 77; *Nutbrown v. Thornton*, 10 Ves. 163; *Arundell v. Phipps*, 10 Ves. 139; *Lowther v. Lowther*, 13 Ves. 95. In *Earl of Macclesfield v. Davis*, 3 V. & B. 16, where a bill was filed for the delivery up of an iron chest, containing certain articles said to be heir-looms, Lord Eldon said, "It is now too late, since the case of *Fells v. Read*, following the case of *Pusey v. Pusey*, to discuss whether this Court will interfere for the specific delivery of a chattel; and if it will in such case *à fortiori*, the restitution of heir-looms must be decreed, upon which there never was any doubt."

And it seems now that the interposition of courts of equity will not be confined to those cases in which the articles sought are of some peculiar or intrinsic value, if there subsist any fiduciary relation between the parties. Thus, in *Wood v. Rowcliffe*, 3 Hare, 304, where a bill had been filed against an agent for the delivery up of furniture and household effects, deposited by the plaintiff with him, and to restrain him from parting with them, as he threatened to do, it was argued for the defendant, who demurred for want of equity, that household furniture and effects were not chattels of such a peculiar or valuable nature as to be within the rule, and that all the cases in which the specific delivery up of chattels had been decreed were put upon their peculiar and valuable nature, as the horn in *Pusey v. Pusey*, the tobacco-box of the club in *Fells v. Read*, the patera in *The Duke of Somerset v. Cookson*, the box of jewels in *Saville v. Tankred*, and the heir-looms in *The Earl of Macclesfield v. Davis*,—all being articles of curiosity, antiquity, or hereditary estimation, which, as observed by Lord Eldon, in the case of *Nutbrown v. Thornton*, turned upon the pretium affectionis; and that the same *considerations arose in *Lady Arundell v. Phipps*, where the injunction was [*658] granted to protect ancient family pictures, chattels which Lord Eldon described as being "of a very special and peculiar kind." Sir J. Wigram, V. C., however, overruled the demurrer. "I have not," observed his Honor, "the slightest doubt that the plaintiff is entitled to the protection of the Court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property *in specie* is not confined to articles possessing any peculiar or intrinsic value." Lord Cottenham, upon appeal, approved of the law on this subject, as laid down by the Vice-Chancellor. "The cases," observed his Lordship, "which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power;"

2 Ph. 383. And see *Lingen v. Simpson*, 1 S. & S. 600; *Pooley v. Budd*, 14 Beav. 34; *Pollard v. Clayton*, 1 K. & J. 462.

Upon the same principle, a court of equity will decree a specific delivery up of deeds or writings to the persons legally entitled to them. See *Brown v. Brown*, 1 Dick. 62; *Armitage v. Wadsworth*, 1 Madd. 192; *Reeves v. Reeves*, 9 Mod. 128; *Tanner v. Wise*, 3 P. Wms. 296; *Harrison v. Southcote*, 1 Atk. 528; *Ford v. Peering*, 1 Ves. jun. 72; *Papillon v. Voice*, 2 P. Wms. 478; *Duncombe v. Mayer*, 8 Ves. 320; *Knye v. Moore*, 1 S. & S. 61; *Freeman v. Fairlie*, 3 Mer. 30; *Grey v. Cockeril*, 2 Atk. 114; *The Duchess of Newcastle v. Pelham*, 3 Bro. P. C. 460, Toml. ed.; *Reece v. Trye*, 1 De Gex & Sm. 273; *Lady Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134; Tudor's L. C. Real Prop. p. 54, and cases there cited.

In *Jackson v. Butler*, 2 Atk. 306, where mortgage deeds, delivered to a person for the purpose of receiving the principal and interest due on the mortgage, had been pawned by him, were decreed to be delivered up by the pawnee, Lord Hardwicke observing, that the plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

In *McGowin v. Remington*, 2 Jones, 56, (12 Penna. R.,) a decree was made for the restitution of the furniture and contents of the complainant's office, including instruments, maps, plans, and surveys, used or prepared by him in the course of his business, as a surveyor, which had been taken, and were withheld from him by a clerk in his employment, while he was absent from the city on business; and Bell, J., who delivered the judgment of the court, held the following language in the course of his opinion: "The defendant having failed to sustain, by proof, his allegation of sale or gift of the articles sought to be recovered by this bill, the contest in this court is reduced to two questions: first, whether the bill presents sufficient grounds to warrant the interference of a court of equity, in this state, under the statute conferring equitable jurisdic-

tion? Secondly, whether that portion of the decree which covers the surveying instruments and furniture, described in the exhibits annexed to the bill, can be sustained?

"As to the first point: the defendant insists that the only remedy is at law. Though the action of replevin is, with us, a broader remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose, as the similar English courts, the propriety of exerting the equitable jurisdiction now invoked, must depend with us on the same reasons that are deem-

ed sufficient to call it into action there. Here, as there, the inquiry must be, whether the law affords adequate redress by a compensation in damages, where the complaint is of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury, by decreeing a return of the thing itself.

“The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages; *Lowther v. Lowther*, 13 Ves. 389. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it cannot easily, or at all, be replaced. Of these may be instanced, the title-deeds of an estate and other muniments of property; valuable paintings; *Lowther v. Lowther*, supra; an antique silver altar-piece; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; an ancient horn, the symbol of tenure, by which an estate is held; *Pusey v. Pusey*, 1 Ves. 273; heir-looms; 3 Ves. & B. 18; and even a finely carved cherry-stone; *Ambler*, 77. Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and, therefore, not to be measured in damages by a jury, who cannot enter into the feelings of the owner; so, too, the impossibility, or even great difficulty of supplying their loss, may put damages out of the ques-

tion as a medium of redress. But these are not the exclusive reasons why chancery interferes, for there may be cases in which the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it this is always so, where, from the nature of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie. Of this *Buxton v. Lister*, 3 Atk. 384, furnishes an example in the analogous instance of a contract for the sale of personalty: contracts, which are most commonly left to be dealt with at law. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it and to pay for it, in six yearly instalments. Lord Hardwicke was, at first, extremely reluctant to entertain the bill, but after discussion came to the conclusion, that, though relating to a personal chattel, it was such an agreement that the plaintiff might come into chancery for a specific performance. He instanced the case of *Taylor v. Neville*, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, by instalments, where the decree prayed for was made; and proceeded to observe—‘such sorts of contracts as these, differ from those that are immediately to be executed. There are several circumstances which may concur. A man may contract for

the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber; and this is on the part of the buyer. On the part of the seller, suppose a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing can answer the justice of the case but the performance of the contract in specie.' Similar in principle is the case of *Falls v. Reid*, 13 Ves. 70, where the plaintiffs prayed the restoration of an engraved silver snuff-box, used for many years by a society, as the symbol of their association; and *Nutbrown v. Thomson*, where a tenant brought a bill against his lessor, who, under pretence of the tenant's covenant, had repossessed himself of the land, and seized upon the stock of cattle, which by the lease the tenant was to enjoy for seven years. The objection was that the tenant's remedy, if he was entitled to one at all, was at law, in damages. But how, asked Lord Eldon, are damages to be estimated in such a case? The direction to a jury must be to give, not the value of the chattels, but their value to the tenant! A similar question may well be propounded in our case. By what standard would you measure the injury the plaintiff may sustain *in futuro* from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labor necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which, in the mean time, might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future;

or it might be very great, depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are said to be copies of private papers, we are by no means satisfied they could be replaced at all. Certainly not without permission of the owners; a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of these documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose, that a perfect relief at law is not apparent. The thing to be guarded against is, not the invasion of the defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits the powers of the several courts. What is to be avoided is an unnecessary trespass upon the province of the common law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of?

"But there is another ground upon which this proceeding may be sustained. In *Falls v. Reid*, the snuff-box was deposited with the defendant, as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord Rosslyn held that under these facts, the defendant was a depository on an express trust which, upon a common

ground of equity, gave the plaintiff title to sue in that court; and in this he was supported by Lord Eldon, in the subsequent case of *Nutbrown v. Thornton*. According to the proof in our case, the papers and documents claimed were left with the defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated—a spell sufficiently potent to call into vigorous activity the authority invoked.

“As to the second question, it is perhaps enough to say, that when once a court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction

once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Thus in the case last cited, the chancellor ruled that where a person is found wrongfully in possession of a farm, over which the court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the court will undoubtedly make him account for and deliver back the whole. In the case at bar the surveying instruments and office furniture stand in the same category with the maps, drafts, &c.; were delivered to the defendant at the same time, and are withheld by an exertion of the same wrong. In short, they enter into and make part of the same transaction, and may, therefore, be the objects of the same measure of redress.”

EQUITABLE CONVERSION.

*FLETCHER v. ASHBURNER.

[*659]

JUNE, 1779.

REPORTED 1 BRO. C. C. 497.

“CONVERSION.]—Where a real estate is ordered to be sold, it becomes personalty, and shall go accordingly.

JOHN FLETCHER by his will devised his burgage houses and free rents in Kendal, and all his personal estate, to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow, and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half a guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share

alike; provided, that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike, equally; and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them.

The testator died, leaving Agnes his widow, William his only son and heir-at-law, and Mary his daughter.

Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste viduity, against the disposition of her husband by will.

[*660] Mary attained twenty-one, but died unmarried, in the *life of her mother and brother. William was twenty-one at the death of the testator, and died without issue, in the life of his mother; the mother died the widow of the testator.

Upon her death, a bill was filed by the heir-at-law of William, and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir-at-law.

The representative of the widow, who was the sole next of kin of William, the son, by answer, claimed the property as personal; alleging, that, by the direction to the trustees to sell the real estates, they become as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was, that the personal representative of William was not before the Court.

But Sir Thomas Sewell, M. R., was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party; and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Madocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go to the real, not the personal, representative; that it was clearly the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person; that he directed it to be sold merely for the purpose of a division; that, in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and, from thenceforth, the son alone becoming entitled, upon the death of his mother, it was to be considered as land. They relied upon the case of *Flanagan v. Flanagan*, 8th June, 1768, before Lord Camden, which was a devise of real and personal estate to trustees in [*661] *trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts, the surplus, after payment of debts, to A. A suit was

instituted for payment of the debts, and the real estates decreed to be sold ; part was sold ; and afterwards A. died, leaving a son and daughter ; the cause was revived against the son ; and it being apprehended that sufficient was not sold to pay the debts, a further part of the real estate was sold under the order of the Court. It afterwards proved that the money produced by the first sale was sufficient to pay the debts ; the question was, whether the heir or the personal representative was entitled to this money. It was alleged by Mr. Wilson, who cited the case, that Lord Camden's determination was, that whatever quality the fund then had, such it should retain ; and he decreed for the personal representative. The other cases mentioned were *Cruse v. Barley and Banson*, 3 P. Wms. 20, and *Digby v. Legard*, before Lord Bathurst.¹

Mr. Kenyon and Mr. Chambre, (on behalf of the defendants, the executors of the widow,) contended that the testator had, by his will, directed the real estate, after the death of his widow, to be sold, and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan v. Flanagan*, it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made and the property to be changed for payment of debts. The cases of *Digby v. Legard*, and *Cruse v. Barley and Banson*, were treated as inapplicable to the present case, being cases of lapsed devises : *Durour v. Motteux*, 1 Ves. 320,² and *Mallabar v. Mallabar*, Forrester, 79, were cited, as decisive of the question in favor of the defendants.

Sir THOMAS SEWELL, M. R., in June gave his opinion. He observed, that nothing was better established than this principle : that money directed to be employed in the *purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property [*662] into which they are directed to be converted ; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise ; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases established this rule universally.

If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple v. Bindon*, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the curtesy ; and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held, because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed ; so that something has resulted to the heir-at-law, as in the case of *Embllyn v. Freeman*, Prec. Ch. 541, and *Cruse v. Barley and*

¹ 3 P. Wms. 22, note (1).

² See will of Motteux correctly stated, 1 S. & S. 292, note (d).

Banson, 3 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir-at-law of the testator. The case of *Durour v. Motteux*, 1 Ves. 320, is a strong case to the point now before the Court; and, if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them, without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour v. Motteux*,¹ Lord Hardwicke made this a principal ground for considering the whole fund as personal estate; in the present case it might be uncertain, till the death of the widow, [*663] *whether the estates must not be absolutely sold; both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother.

There could be no election to take the fund as land or money; for, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold;² the question, therefore, is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir-at-law shall take it, as if no will had been made.

The case of *Flanagan v. Flanagan*³ is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend; and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate, for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, [*664] equally; after the decree, James Flanagan, the son, died *leaving a daughter, and a son, born after his death; part of the estate was sold, and afterwards, James Flanagan, the grandfather, died, leaving his grandson

¹ 1 Ves. 320.

² See also *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 493; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightley*, 6 Madd. 134.

³ See this case cited and explained by Mr. Scott arguendo in *Ackroyd v. Smithson*, post, p. 700.

his heir, and his grandson and grand-daughter his sole next of kin ; after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies : it appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan, the son, claiming a moiety of the surplus, as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan, the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered as improperly made ; that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby v. Legard*¹ is a different question. There the testatrix, (Elizabeth Byerley,) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom, (Lady Cayley,) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir-at-law. The language of the decree is such, that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir-at-law, Mr. Jervoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore v. Scudamore*, Prec. Ch. 543, shows, that, in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of *Ogle v. Cook*,² heard 19th February, 1748, which was this : Mr. Ogle made his will in 1744, and gave *his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during her widow- [*665] hood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have £1000 more than the other ; he gave the residue of his personal estate in the same way. He afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue, in trust for Mrs. Ogle : part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter, against the son, who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will ; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revo-

¹ 3 P. Wms. 22, n.

² See *Collins v. Wakeman*, 2 Ves. jun. 686, where Lord Loughborough says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle v. Cook*, was in reality left undecided.

cation only pro tanto, to let in the debt; and that so much of the estate as remained unsold, should be sold, and that the money raised, or to be raised, by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 Ves. 174, (*Cunningham v. Moody*,) where, by marriage articles, £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment, to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general; and no appointment was made. The father and mother being dead, and the daughter [*666] *being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor, by a second marriage, filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500, considering it as land; and it was observed, that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the curtesy.

In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money: the bill must, therefore, be dismissed without costs.

In the judgment of Sir Thomas Sewell in the principal case, the equitable doctrine of constructive conversion is thus accurately stated, viz.: "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land:" see *Wheldale v. Partridge*, 5 Ves. 396, where this statement of the doctrine is repeated and approved of by Lord Alvanley, M. R.

As to the conversion of money into land.—The authorities show, that money agreed or directed to be laid out in land, becomes land so completely, as to acquire all the property of land; thus it will be considered as real and not personal assets. Suppose, for instance, A. bequeathed a sum of money to trustees, upon trust to purchase lands, and settle them upon B. and his heirs, or by marriage articles money had been agreed to be laid out in lands for B.

and his heirs, on the death of B., without a purchase having been made, the money will be considered *as land : and, therefore, it would not, previous to 3 & 4 Will. 4, c. 104, have been liable to the payment of the [*667] debts of B. by simple contract. (*Whitwick v. Jermin*, cited in *Baden v. Earl of Pembroke*, 2 Vern. 58; *Lawrence v. Beverley*, cited ib. 55; S. C., 2 Keb. 841; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 Bro. P. C. 530; *Foone v. Blount*, Cowp. 467.) But it would be bound as real assets by a judgment: *Frederick v. Aynscombe*, 1 Atk. 392. However, since the passing of 3 & 4 Will. 4, c. 104, money directed to be laid out in the purchase of land will be liable, as other *real assets*, to the payment of simple contract debts.

Upon the same principle, money agreed or directed to be converted into land, will be subject to tenancy by the curtesy; thus, in *Sweetapple v. Bindon*, 2 Vern. 536, where A. bequeathed £300 to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over, the husband of the daughter was held to be tenant by the curtesy, although no purchase had been made during his wife's lifetime. And see *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. C. C. 404; *Follett v. Tyrer*, 14 Sim. 125; but since, by a singular anomaly, a woman was not entitled to dower out of an equitable estate, she was not dowable out of money directed to be laid out in land: *Cunningham v. Moody*, 1 Ves. 176; *Crabtree v. Bramble*, 3 Atk. 687; but now, by 3 & 4 Will. 4, c. 105; women married after the 1st of January, 1834, whose dower has not been barred, will be dowable out of equitable estates, it would seem to follow that they will be dowable out of money to be laid out in lands of inheritance.

Money agreed or directed to be laid out in land, will pass under a general devise of all the lands of the person entitled to it, (*Greenhill v. Greenhill*, 2 Vern. 679; Prec. Ch. 320; *Guidot v. Guidot*, 3 Atk. 256; *Rashleigh v. Master*, 1 Ves. jun. 201; S. C., 3 Bro. C. C. 99; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, 17 Ves. 77; or by a devise of "all his lands in a particular county, or elsewhere," although it has been argued, that the testator must have alluded to land, and something local: *Lingen v. Sowray*, 1 P. Wms. 172.

Although a will not coming within the operation of the late Wills Act, (1 Vict. c. 26,) would not at law pass lands purchased after its execution; yet, where money was agreed or directed to be laid out in the purchase of lands, to be settled on the testator and his heirs, even if the money was not laid out in the purchase of lands until after he had made his will, they would in equity pass by it under a general devise. See *Lingen v. Sowray*, 1 Eq. Ca. Ab. 175, pl. 5; but now, lands *purchased after the execution of a will may pass by it at law. See 1 Vict. c. 26, s. 24, which enacts, "that [*668] every will shall be construed, with reference to the real estate, and personal estate, comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Upon the same principle, money agreed or directed to be laid out in land will not pass as money by a general bequest to a legatee; though it will by a particular description, as so much money to be laid out in land, (*Cross v. Addenbrook*, cited in the note to *Lechmere v. Earl of Carlisle*, 3 P. Wms. 222; *Edwards v. The Countess of Warwick*, 2 P. Wms. 171; *Gillies v. Longlands*, 4 De G. & Sm. 372;) and although, previous to the late Wills Act, (which enacts, that no will of an infant shall be valid,) infants of the age of fourteen years might by will have disposed of their personalty, they could not, by will, have disposed of money directed to be converted into land: *Earlom v. Saunders*, Amb. 241.

Money agreed or directed to be laid out in the purchase of land, acquires the descendible properties of land; but with respect to the rights of the heir of the person upon whom money impressed with the character of realty is settled, it is necessary to distinguish between those cases where the heir claims the payment of the money from strangers, and those cases where he claims the payment from the personal representatives of his own ancestor. Where the heir claims payment of the money from strangers, he will, it seems, in all cases be preferred to the personal representatives of his ancestor. Thus, where money has been bequeathed to be invested in land, for the use of the ancestor and his heirs; or where, on the marriage of the ancestor, money has been deposited, either by him or by a stranger, in the hands of trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue, to the ancestor and his heirs; or if, on the marriage of the ancestor, there be a covenant on the part of a stranger to lay out money in the purchase of land, to be settled to the same uses, and the ancestor die without issue—in all these cases the heir of the ancestor, and not his personal representatives, will not be entitled to the money to be laid out in the purchase of land: *Scudamore v. Scudamore*, Prec. Ch. 543; *Disher v. Disher*, 1 P. Wms. 204; *Chaplin v. Horner*, 1 P. Wms. 487; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Knights v. Atkins*, 3 Vern. 20.

[*669] If the heir seeks payment of the money from the personal *representatives of the ancestor, his claims will be superior to those of the personal representatives, if there be any prior outstanding interest in the fund in another person. Thus, where the ancestor has covenanted to lay out a sum of money in land, to be settled upon himself for life, remainder to his wife for her life, remainder to the issue of the marriage; if, on the death of the ancestor, the wife or any issue be living, although they may afterwards die, the heir can call upon the personal representatives for the money: *Kettleby v. Atwood*, 1 Vern. 298, 471; *Lancy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. Wms. 483; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; Cas. t. Talb. 80; *Oldham v. Hughes*, 2 Atk. 452; *Wrightson v. Macaulay*, 4 Hare, 487.

If, however, the wife die in the lifetime of the ancestor, leaving no issue of the marriage, then, as the obligation to lay out and the right to call for the money centre in the same person—viz. the ancestor—the covenant, without

any act on his part, will be considered as discharged: the money, to use a quaint expression, is "*at home*," and the heir will have no equity against the representatives of his ancestor. Thus, in *Chichester v. Bickerstaff*, 2 Vern. 295, it appears that, on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles, by articles, was to pay £1500 in part of the portion, which, *together with £1500 more, to be advanced by Sir John* within three years after the marriage, was to be invested in land, and settled on Sir John for life, his intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died, and Sir John three days after, without issue. Sir John, by his will, made Sir Charles *his executor*, and devised the residue of his personal estate, after debts, &c. paid, to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles, to compel him to pay the 1500*l.*, insisting that, by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers said, "This money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and disposal of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this case is much stronger where there is a residuary legatee;" and therefore dismissed the bill. Doubts have been thrown upon this case by Sir Joseph Jekyll, M. R., in *Lechmere v. Earl of Carlisle*, *3 P. Wms. 221, [*670] and by Lord Talbot, in *Lechmere v. Lechmere*, Cas. t. Talb. 90; but they seem to have supposed that the plaintiff in this suit sought the £1500 which Sir Charles was to pay, and to have overlooked the fact, that Sir Charles was executor of Sir John, and that the plaintiff must have claimed the £1500 to be advanced by Sir John. In the great case of *Pulteney v. Darlington*, 1 Bro. C. C. 238, Lord Thurlow evidently considered that the £1500 to be paid by Sir John was sought by the heir-at-law from the assets in the hands of Sir Charles, *his executor*; for he says, "Where a sum of money is in the hands of one, without any other use but for himself it will be money, and the heir cannot claim; like the case of *Chichester v. Bickerstaff*, against which I think there is no judgment, though there are a number of opinions.—I know no better authority than that case." In the case of *Pulteney v. Darlington*, 1 Bro. C. C. 223, money impressed with the qualities of realty had come to the hands of the person (Lord Bath) solely entitled to it under the ultimate limitation in fee; and the person so entitled, without taking any notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust moneys, (except certain estates therein mentioned,) to his brother H. in fee, and gave him all the residue of his personal estate, and made him executor. His brother H. subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors,

for certain trusts mentioned in his will. Lord Thurlow, affirming the decree of Lord Bathurst, dismissed the bill brought by the heir-at-law to have the money laid out in land. "If," said his Lordship, "A. B. has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on this subject, his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether that is clearly so or not, circumstances of demeanor in the person (even though slight) will be sufficient to decide it: a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did receive it; he had it in his hands. Suppose he had it by way of covenant—otherwise, where would there be an end? If he kept it, subject to [*671] *a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." This decision was affirmed upon appeal in the House of Lords, 7 Bro. P. C., Toml. ed. 530, and "went," as Lord Eldon says, "no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person he might; and the question in that cause was, not upon the equity between the heir and executor, but whether the money was at home:" 8 Ves. 235.

It may be here mentioned, that Lord Rosslyn, in the case of *Walker v. Denne*, 2 Ves. jun. 175, 176, observed, that, as between the heir and personal representative, their rights were pure legal rights; that chance decided what should be real, what personal; and that neither had a scintilla of equity to make the property that which it is not in fact. And the same opinion is expressed in *Oxenden v. Lord Compton*, 2 Ves. jun. 70; *Lord Compton v. Oxenden*, 2 Ves. jun. 265. This doctrine, however, of Lord Rosslyn's has been repeatedly dissented from in subsequent decisions. "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn, in *Walker v. Denne*, and some other modern authorities, that if an instrument is to be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly impressed with real uses, as land, and one of these uses being for the benefit of the heir, the impression will remain for his benefit; and, to put an end to that impression, it must be shown either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either; and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir:" *Wheldale v. Partridge*, 8 Ves. 235. See *Lechmere v. Lechmere*, Cas. temp. Talb. 90; and Sir W. Grant, M. R., in *Thornton v. Hawley*, 10 Ves. 138, also observes, "There is no weight in the circumstance that the property is found in the shape of money or land, for the cha-

racter is to be found in the deed; and in *Wheldale v. Partridge*, the Lord Chancellor lays down, in which I perfectly concur, that it is a circumstance that goes no way, except when the fund gets into the possession of a party who would have it in either way:” *Kirkman v. Miles*, 13 Ves. 338; and see *Stead v. Newdigate*, 2 Mer. 521; *In re Pedder’s Settlement*, 5 De Gex, Mac. & G. 890.

It seems that money agreed or directed to be laid out in land, and [*672] *settled upon a person in fee, will not, upon his death without heirs, be converted in equity, so that it should escheat to the Crown. “To convert for the Crown,” says Lord Rosslyn, “is too extraordinary for a court of equity:” *Walker v. Denne*, 2 Ves. jun. 170, 185; *Burgess v. Wheate*, 1 Eden, 177; *Henchman v. Attorney-General*, 3 My. & K. 483, 494.

Where money impressed with the character of realty belongs to a person who is convicted of felony, it will not be forfeited to the Crown, as would be the case, if it were not for the notional conversion. *Re Harrop’s Estate*, 3 Drew. 726, and see *In re Wharton*, 5 De G. Mac. & G. 33; *In re Thompson’s Trusts*, 22 Beav. 506.

As to the conversion of land into money.]—Upon the same principle as money agreed or directed to be laid out in land will be considered in equity as land, so land agreed or directed to be sold will be considered as money, and as such will not pass under a devise of land; (*Elliott v. Fisher*, 12 Sim. 505;) but will pass under a general residuary bequest of personal estate; (*Stead v. Newdigate*, 2 Mer. 521; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Midland Counties Railway Company v. Oswin*, 1 Coll. 74;) and, in case of intestacy, will go to the personal representatives: *Gilb. Lex. Prætoria*, 243; *Ashby v. Palmer*, 1 Mer. 296; *Burton v. Hodson*, 2 Sim. 24; *Biggs v. Andrews*, 5 Sim. 424; *Elliott v. Fisher*, 12 Sim. 505; *Griffith v. Ricketts*, 7 Hare, 299; *Hardey v. Hawkeshaw*, 12 Beav. 552.

In *Ex parte Hawkins*, 13 Sim. 569, the Common Council of London being empowered by a local act of Parliament to take a freehold house belonging to A., for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. The amount of the purchase-money was afterwards agreed upon, and an abstract of A.’s title was sent to the Common Council. In April, 1841, he died, having by his will, dated in 1837, devised his real estate to B., and his residuary personal estate to C. Upon a petition being presented by the executors of the residuary legatee for the payment to them of the purchase-money, which, after A.’s death, had been paid into Court under the act, it was contended by the devisee, that, as the notice given by the Common Council of their intention to take the premises, did not amount to a binding contract within the Statute of Frauds, the purchase-money retained the character of realty. However, Sir L. Shadwell, V. C., held, that it was part of the testator’s personal estate, and that, subject to his debts, it belonged to his residuary legatee. “Although,” said his Honor, “there was no binding contract within the Statute of Frauds, I think that there [*673] *was that which was tantamount to it; for the act made it lawful for

the Common Council to take and use any tenements and hereditaments which they might deem it necessary or expedient to take, use, or pull down and remove for the purposes of the act, at the expiration of six months after notice in writing of their intention to take or use the same, given to the owners or the occupiers thereof. The effect of that provision was to give to the Common Council a parliamentary power to contract for the tenements required for the purposes of the act; and under the same provision, they had power to enter upon the tenements at law: a much stronger power than could have been given by any private contract between them and the owners of the tenements." And see *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *Galliers v. Allen*, 13 Sim. 577, n.

So where the owner in fee of an estate having devised it to an infant, agreed with a Railway Company under their compulsory powers to sell a portion of it to the Company. The owner died before the completion of the purchase without having altered his will. It was held by Sir J. Romilly, M. R., that the executors of the landowner, and not the devisee, were entitled to the purchase-money, and to the compensation for severance, and that the Railway Company was bound to pay the costs of the infant devisee. *In re The Manchester and Southport Railway Company*, 19 Beav. 365.

If, however, the agreement of the Railway Company should not be for the purchase of land, but merely that if the Company take any land under the compulsory powers, of their act, the amount shall not be determined by a jury, but shall be at a fixed sum per acre, inasmuch as the subject-matter of the contract is not the land but the price of the land, conversion will not take place, and upon the death of the landowner, before the land is taken by the Company, it will go to the persons entitled to his real estate. *Ex parte Walker*, 1 Drew. 508.

Upon the same principle—viz. the notional conversion of land into money, an alien, although he cannot hold land as against the Crown, will, nevertheless, be entitled to the proceeds arising from the sale of land devised to trustees to sell for his benefit: *Du Hourmelin v. Sheldon*, 1 Beav. 79, affirmed on appeal by Lord Cottenham, 4 My. & Cr. 525.

Where land is devised to trustees upon trust to convert into money for purposes, which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession, nor has the Crown any right to come into equity to ask that the land should be converted, in order that it might take the money as *bona vacantia*, [*674] *nor even if the land has been unnecessarily converted, can the Crown make good any claim, as the money will be the absolute property of the trustees: *Taylor v. Haygarth*, 14 Sim. 8; *Walker v. Denne*, 2 Ves. jun. 185; *Cradock v. Owen*, 2 Sm. & G. 241.

As to whether the Court will execute a trust of lands for alien, in favor of the Crown, see the conflicting cases of *Rittson v. Stordy*, 3 Sm. & Giff. 230; and *Barrow v. Wadkin*, 5 W. R. 695, M. R.

Conversion must be imperative.—The direction to convert either money into land or land into money must be express and imperative; for if conver-

sion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus in *Curling v May*, cited 3 Atk. 255, A. gave £500 to B., in trust that B. should lay out the same upon a *purchase of lands, or put the same out on good securities*, for the separate use of his daughter H., (the plaintiff's then wife,) her heirs, executors, and administrators, and died in 1729. In 1731, H. the daughter died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the administrator; for the wife, not having signified any intention of a preference, the Court would take it as it was found: if the wife had signified any intention, it should have been observed, but it was not reasonable at that time to give either her heir or administrator, or the trustee, liberty to elect; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention.

So, likewise, if money is directed to be laid out "in government or other securities, or in the purchase of freeholds," or "to remain at interest, or be laid out in land," or "to be laid out in freeholds or leaseholds;" or if similar expressions are made use of, leaving the nature of the investment optional, or which do not sufficiently indicate an intention that the money should be laid out in land at all events, no conversion will take place until the trustees have actually exercised their discretion, which, when clearly given to them, the Court will not control. See *Van v. Barnett*, 19 Ves. 102; *Amler v. Amler*, 3 Ves. 583; *Walker v. Denne*, 2 Ves. jun. 170; *Wheldale v. Partridge*, 5 Ves. 388; S. C., 8 Ves. 227; *Polley v. Seymour*, 2 Y. & C. Exch. Ca. 708.

In *Bourne v. Bourne*, 2 Hare, 35, real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the principal and interest of the mortgage debt, as therein mentioned, *to reconvey the estate to the mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustee [*675] should enter into possession of the premises, and, *at his discretion*, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs) to the mortgagor, *his heirs, executors, administrators, or assigns*. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail. Sir James Wigram, V. C., held, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. "If," said his Honor, "the trustee had taken the property, with absolute directions to sell and convert it, the circumstance, that the directions had not been carried into effect at the death of the testator, might have been immaterial, and it might have been treated as personalty. But, in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and at the discretion of the trustee to sell it, for the purpose of recovering payment of the debt for the mortgagee. The direction to reconvey the estate, in case of payment of the mortgage-money, is inconsistent with the

notion that there was any intention that the property should be absolutely converted by the effect of the conveyance. The event upon the happening of which the trustee might at his discretion have sold the estate—namely, the default in payment of the mortgage money—took place in the lifetime of the testator; but the discretion to sell had not been exercised at the time of his death. The consequence is, that the estate passed to his devisees as realty, subject to the mortgage, and the trustee must therefore account to the devisees for the surplus proceeds of the sale.”

And where trustees have a mere power with the consent of a person in possession of certain settled estates to lay out personal property in land to be settled to the same uses, no absolute conversion takes place. *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524.

So, where money was to be laid out in the purchase of land, “with the joint approbation and consent of the husband and wife, and not without,” and no approbation or consent was given by them, the money was considered as unconverted, and to remain as personal estate: *Davies v. Goodhew*, 6 Sim. 585.

But although conversion is apparently optional, as where trustees are directed to lay out personalty, “either in the purchase of lands of inheritance, or at interest,” or “in land or some other securities,” as they shall think most fit [*676] and proper; yet if *the limitations are adapted only to real estates*, so as to manifest the testator’s intention that land shall be purchased, the money must be considered as land, although it be not actually so invested by the trustees: *Cowley v. Hartstonge*, 1 Dow. 361; *Cookson v. Reay*, 5 Beav. 22; 12 C. & F. 120; *Johnson v. Arnold*, 1 Ves. 169. See also Sugd. Prop. 462.

In *Earlom v. Saunders*, Amb. 241, W. P. devised lands to trustees and their heirs, to the use of his wife for life, remainder to his first and other sons in tail, remainder to Widdrington Powell and William Powell, in fee, as tenants in common. And he directed, that £400 should be raised by his executrix out of his personal estate, and paid by her to his trustees, or one of them, who should lay out the same *in a purchase of lands, or any other security or securities, as they should think proper and convenient*; and he directed that the lands so to be purchased, and the security or securities on which the £400 should be so laid out, should be made to, and settled on, the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease, to such uses, and under such provisions, conditions, and limitations, as his lands before devised were limited. Lord Hardwicke held, that conversion was not at the election of the trustees. “This Court,” said his Lordship, “never admits trustees to have such election, to change the right, unless it is expressly given to them. Here the money is to be laid out in land or securities, for such uses as the land is before settled. If it is laid out in securities, (which are personal,) all the limitations might not take place; for if there was a son born, he would take the whole money, as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is, that the money be laid out on securities till lands are purchased, and the interest and dividends, in the meantime, to go to such persons as would

be entitled to the land." See also, *Edwards v. Countess of Warwick*, 2 P. Wms. 171.

Where conversion is to take place at the request of certain persons, if the words of request are merely inserted for the purpose of enforcing the obligation to convert, although a conversion has taken place without consent, it will be considered to have been properly made. Thus, where the limitations are *only adapted to real estate*, a direction to lay out money *after the request* of persons, in the purchase of lands, will be construed as imperative, although no request may have been made, and there is a declaration, that *until* the purchase should be made, the money should be placed out on securities, and a disposition of the dividends *and interest in the mean time, to the same persons to whom the rents and profits of the estates to be purchased would go. See [*677] *Thornton v. Hawley*, 10 Ves. 129, where Sir W. Grant, M. R., observes, in reference to the force of the words "after request," "Nothing is more common than to direct money to be laid out upon request. The object of that is, only to insure that the act shall be done when the request is made,—not to prevent it until request." See also, the judgment of Hutchins, Lord Commissioner, in *Symons v. Rutter*, 2 Vern. 227, approved of by Lord Thurlow, in *Pulteney v. Darlington*, 1 Bro. C. C. 238, and in *Lechmere v. The Earl of Carlisle*, 3 P. Wms. 219, Sir J. Jekyll, M. R., in reference to *Symons v. Rutter*, says, "In this last case, I observe, it was admitted, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband and wife, it must have been taken as land. Now such clause makes no manner of difference; for upon a convenient purchase being proposed, the Court would have taken on themselves to judge thereof, and without some reasonable objection made, would have ordered the money to be laid out in it; so that such clause seems to have been immaterial in the marriage articles, and as if omitted, and the opinion of Hutchins to have been well grounded;" sed vide *Stead v. Newdigate*, 2 Mer. 530.

Where however words requiring the request or consent of parties to a sale are inserted for the purpose of giving a discretion to them, if the sale takes place without their request or consent, the proceeds of the sale will still be considered as land. Thus in *Davies v. Goodhew*, 6 Sim. 585, the sale was to be "with the joint consent and approbation of the husband and wife, and *not without*;" conversion, therefore, in that case, was held to be not imperative, but at the option of the husband and wife. See also, *In re Taylor's Settlement*, 9 Hare, 596.

Where there was a mere discretionary power to convert real property into personalty, and to distribute it amongst a class, and the trustees died after having made only a partial conversion, the discretionary power having been extinguished by their deaths, it was held, that the class, or their representatives, must take the respective estates as they found them: *Walter v. Maunde*, 19 Ves. 424. And see *Shipperdson v. Tower*, 1 Y. & C. C. C. 441. But the result will be different where the power is imperative, and in the nature of a trust. Thus, in *Grievesson v. Kirsopp*, 2 Keen, 653, where a testator gave to his widow, "for the benefit and advantage of his children," power of selling

his W. estate, and by a codicil, he expressed himself in *effect thus :
 [*678] "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she my said wife shall and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The widow died without having sold or appointed the estate. It was held, by Lord Langdale, M. R., that the power was in the nature of a trust for the children, and that, subject to such appointment as the widow might have made, the children were entitled in equal shares ; and that the direction to sell, expressed as it was, operated as a conversion of the real estate, and that the children were entitled to take the money to arise from the sale as personalty. See also, *Burrell v. Baskerfield*, 11 Beav. 525.

The conversion of land into money may be implied without any express words directing a sale. (See *Mower v. Orr*, 7 Hare, 475.) But in order to effect such conversion the intention must be clear. *Cornick v. Pearce*, Ib. 477.

Under the general Stamp Act, (55 Geo. 3, c. 184, Sched. part 3,) "money to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of," is liable to the payment of legacy duty. The question often, then, arises, whether the direction for conversion is absolute and imperative, or merely optional ; for in the former case, the real estate is liable to the payment of legacy duty, even though it be not sold, in consequence of the person absolutely entitled, electing to take it, instead of the proceeds to arise from a sale : *Attorney-General v. Holford*, 1 Price, 426 ; *Advocate-General v. Ramsay's Trustees*, 2 Cr. M. & R. 224, n. ; *Williamson v. The Advocate-General*, 10 C. & F. 1 ; while in the latter case it is clear, if the trustees, in the exercise of their discretion, leave the land unsold, the legacy duty will not attach ; though it has been held, that it will if the trustees, in the exercise of such discretion, sell : *Attorney-General v. Mangles*, 5 M. & W. 120 ; and see *Attorney-General v. Simcox*, 1 Exch. Rep. 749. However, notwithstanding those cases, it seems doubtful whether the liability to the duty should depend upon any act of the trustees : *In re Evans*, 2 Cr. M. & R. 206 ; and see cases cited, 10 C. & F. 14 ; and *The Advocate-General v. Smith*, 1 Macq. H. L. Cas. 76.

Although there is a power to sell, and a sale takes place, if it is effected, not under the power, but under the jurisdiction of the Court of Chancery, legacy duty will not be payable. Thus when a will empowered trustees, with the consent of A., to sell real estate, and to invest a sufficient sum to answer [*679] two annuities ; the rents being deficient to pay the annuities, the *Court ordered a sale, and out of the produce, £20,000 consols were purchased to provide for the annuities. Legacy duty being claimed, on the corpus of the consols, it was held by Sir J. Romilly, M. R., that the validity of the claim depended on the determination of the question, whether the sale had taken place under the general jurisdiction of the Court, or under the power in the will, and his Honor being of opinion that it took place under the juris-

diction of the Court, that no legacy duty was payable. *Hobson v. Neale*, 17 Beav. 178.

And where trustees having a power of sale are directed to invest the proceeds "in the purchase or on mortgage" of other lands, (*Mules v. Jennings*, 8 Exch. 830,) and *à fortiori*, where they are simply directed to invest the proceeds in the purchase of real estate, (*Heal v. Knight*, 8 Exch. 839, n.,) the legacy duty will not attach, although a sale may have taken place, and the person beneficially entitled has elected to take the money in preference to its being invested in the purchase of land. "The Crown," observed Alderson, B., "has no claim except where the money is handed over to a party *by force of the will of the testator*, not where the money is handed over under an arrangement in which the will of the devisee and the testator co-operate." *Mules v. Jennings*, 8 Exch. 830.

Probate duty, however, is not payable in respect of real estate, although absolutely directed to be converted into personalty. *Matson v. Swift*, 8 Beav. 368; *Custance v. Bradshaw*, 4 Hare, 324. And see ante, p. 162.

Of the period from which conversion will be considered to commence.—Where absolute conversion is directed to be made by deed, if no time for it be pointed out, it will take place from the delivery of the deed, (*Griffiths v. Ricketts*, 7 Hare, 299,) and in the case of a will it will take place from the death of testator, (*Beauclerk v. Mead*, 2 Atk. 167; see *Ward v. Arch*, 15 Sim. 389,) even although there may be a direction that a sale should take place "when-ever it should appear advantageous." *Robinson v. Robinson*, 19 Beav. 495.

The conversion may be made by the owner to depend upon the option of third parties; as, for instance, trustees.

So, likewise, it may be made to depend upon the option to purchase at a future time. Thus in the leading case of *Lawes v. Bennett*, 1 Cox, 167, a person named Witterwonge, in 1758, demised a farm to Douglas for seven years, and there was an agreement endorsed upon the lease, that if Douglas should, before the 29th of Sept. 1765, give notice in writing of his wish to purchase the inheritance of the premises for *£3000, Witterwonge agreed to sell and to execute to him a proper conveyance thereof. Wit- [*680] terwonge died in 1763, having by his will devised all his real estates to the defendant Bennett, and all his personal estate to the plaintiff, Mary, the sister of the defendant Bennett, equally as tenants in common. In 1762, Douglas assigned the lease, and the benefit of the agreement to Waller, and on the 2nd of February, 1765, Waller called upon Bennett to perform the contract entered into by Witterwonge, for the sale of the premises for £3000, and he accordingly executed a conveyance to Waller in fee. Bennett having died, a bill was filed by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, claiming a moiety of the £3000 and interest, and Sir Lloyd Kenyon, M. R., decreed accordingly. "It is very clear," observed his Honor, "that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no dis-

tion at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not; when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. . . . I must, therefore, declare this £3000 to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof."

Until, however, in such a case the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate. Thus in *Townley v. Bedwell*, 14 Ves. 591, the testator in the cause granted a lease to Townley for thirty-three years, with a proviso that "if Townley, his executors, administrators, or assigns should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, £600 for the purchase, upon having a good title made to him Townley, his executors, administrators, or assigns." The testator died without having devised the premises; and before the expiration of the lease, Townley declared his option to purchase according to the proviso. It was held by Lord Eldon, C., (though evidently with some reluctance,) upon the authority of *Lawes v. Bennett*, that from the time of the option, Townley was entitled to the premises, and that [*681] he should pay interest upon the purchase-money, which money and interest he held to be personal estate of the testator, and which ought to go to his next of kin, but that the rents of the premises, until the option, belonged to the heir. See also *Collingwood v. Rowe*, 3 Jur. N. S. 785; 5 W. R. 484; V. C. K., sed vide *Drant v. Vause*, 1 Y. & C. C. C. 580; and *Emuss v. Smith*, 2 De G. & Sm. 722, where it was held by Sir J. L. Knight Bruce, V. C., that a specific devise by name of the property, subject to the option, carried to the devisee the purchase-money also when the option was exercised.

The question may arise, which was suggested arguendo in *Lawes v. Bennett*, (1 Cox, 170,) if the person having the option to purchase, should release such option to the heir or devisee, whether a court of equity could afford any relief. There does not appear to be any express decision upon the point, but Sir Lloyd Kenyon, M. R., in his judgment said he thought that a court of equity would give relief, "if it appeared to be done collusively to oust the legatee of his personal estate."

As to conversion in certain cases by the Court or third parties.—With regard to the real estate of a bankrupt, vested in his assignees for payment of his creditors, it is clear that if any of it remain unsold before the death of the bankrupt, and the creditors have been fully satisfied, it will go, in case of intestacy, to his heir-at-law. *Bromley v. Goodere*, 1 Atk. 75.

Should the real estate of the bankrupt be sold or contracted to be sold in his lifetime, it will be considered as converted, and upon his death intestate, his heir-at-law will not be entitled to it, though he will be so, if the sale or contract for sale be entered into after the death of the bankrupt. Thus in

Banks v. Scott, 5 Madd. 493, part of the real estates of the bankrupt Scott, were sold during his life; part were contracted to be sold, but not sold at the time of his death, and the remainder were sold after his death, and a surplus remained in the hands of his assignees. It was held by Sir John Leach, V. C., that the heir of Scott, as such, had no claim in respect of the estates sold or contracted to be sold in the life of Scott, but that he was entitled to the overplus, after payment of creditors arising from the estates sold after the death of the bankrupt: "As to the real estates," said his Honor, "sold or contracted to be sold, during the life of the bankrupt Scott, it must at his death be considered as converted into personalty; but as to the real estate which was unsold and uncontracted for at the death of the bankrupt, it is to be considered as descending to his heir, subject to the *charge created by provisions of the bankrupt laws for the payment of his debts. It [*682] can make no difference in principle, whether such a charge be created by provision of the law, or the provision of the party. As far as the real estate is not exhausted by that charge, it is the property of the heir."

As to the surplus moneys arising from the disposition of land belonging to lunatics, see 16 & 17 Vict. c. 70, s. 119. See also *In re Wharton*, 5 De G. Mac. & G. 33.

Where a mortgage deed of freehold estate contains a power of sale, with a direction that the surplus moneys to arise from the sale shall be paid to the mortgagor, *his executors or administrators*, if the estate is sold by the mortgagee in the *lifetime* of the mortgagor, then the surplus moneys will be the personal estate of the mortgagor; but if the estate being unsold at the death of the mortgagor, the equity of redemption devolves upon his heir or devisee; if a sale should subsequently take place, the heir or devisee, as the case may be, will be entitled to the surplus produce: *Wright v. Rose*, 2 S. & S. 323, 324. See also *Bourne v. Bourne*, 2 Hare, 35, ante, p. 674.

Where under a decree of the Court more real estate is sold than is necessary for payment of mortgage or other debts, the surplus will still retain the character of realty. See *Cooke v. Dealey*, 22 Beav. 196; there an estate was devised to a married woman subject to the payment of the testator's debts. The estates were afterwards sold under a decree in an administration suit to which the devisee was a party. After payment of debts there remained a sum in court. On the death of the devisee, it was held by Sir John Romilly, M. R., that the heir-at-law of the devisee and not her husband was entitled to the sum in court. "More of the real estate," said his Honor, "was sold than necessary; of course the conversion is complete to the extent to which the purchase-money was required for the particular object for which the sale took place, namely, for the payment of the debts and costs, but the excess, though in the form of money, remained as before impressed with the character of land. The money was raised by sale instead of by mortgage, and for the convenience of the purchaser too much was sold, the excess, therefore, beyond what was required, retains its original character of realty. . . . I am, therefore, of opinion, that all the money not required for the purpose of the suit, and not disposed of in the performance of the order and decree of the Court, belongs

to the parties in its original character, that is, it remains real estate, and goes [*683] to the heir-at-law :” See, also, *Jermey v. Preston*, *13 Sim. 356, 366; and *Lancaster v. Evors*, 1 Ph. 349. The case of *Flanagan v. Flanagan*, cited in the principal case, seems to have turned upon the terms of the decree for payment : and see *Johnson v. Webster*, 4 De G. Mac. & G. 484.

The question frequently arises, when land has been taken by companies under the Lands Clauses Consolidation Act, as to whether the money arising from the sale is to be considered as land or money ; with reference to this subject it has been recently laid down, that “ where the circumstances of the case have brought it under the 69th section of the Lands Clauses Consolidation Act, the money has been held to bear the character of realty ; but if, on the other hand, the circumstances have brought the case under the 78th section of the Lands Clauses Consolidation Act, then the money has been held personalty.” Per Kindersley, V. C., 3 Drew. 733.

Where land had been taken by a company, under the Land Clauses Consolidation Act, from a person who was, and continued until his death, in a state of mental imbecility, but was not the subject of a commission of lunacy, and the money was paid into Court, it was held by Lord Cranworth, V. C., after the death of the land-owner, that the money was not to be reinvested in or considered as land, but to be paid to his personal representatives ; his Lordship being of opinion, that the money ought to be treated “ as being paid in by a party seised in fee and competent to sell.” See *Ex parte Flamank*, 1 Sim. N. S. 260.

The case of *The Midland Counties Railway Company v. Oswin*, 1 Coll. 80, may at first sight appear to conflict with the judgment of Lord Cranworth in *Ex parte Flamank* ; but as his Lordship there clearly points out, the decision in the former case turns upon the construction of the particular terms of a local act.

As to the question of conversion arising upon the construction of local acts, see *Cramer’s case*, 1 Sm. & G. 32 ; *In re Taylor’s Settlement*, 9 Hare, 596 ; *Midland Counties Railway Company v. Oswin*, 1 Coll. 80 ; *In re Harrop*, 3 Drew. 726 ; *In re Robertson*, 3 Jur. N. S. 784.

Election.—Although land absolutely directed or agreed to be converted into money, and money directed or agreed to be converted into land, will immediately be impressed with the character of the property into which each is respectively to be converted, still this notional conversion may be put an end to, by the absolute owner electing to take the property in its actual state ; and the Court will not direct a conversion against his election, because, when converted, he might immediately *reconvert it ; for, as is quaintly observed by Lord Cowper, in *Seeley v. Jago*, 1 P. Wms. 389, “ Equity, like nature, will do nothing in vain.”

Who may elect.—An infant cannot ordinarily elect ; (*Carr v. Ellison*, 2 Bro. C. C. 56 ; *Van v. Barnett*, 19 Ves. 102 ;) but where the property is the subject-matter of a suit, upon the certificate of the chief clerk, finding that it is for the benefit of the infant to do so, he may elect : (*Robinson v. Robinson*, 19 Beav. 494.) A lunatic cannot elect ; (*Ashby v. Palmer*, 1 Mer. 296 ; *In*

re Wharton, 5 De Gex, Mac. & G. 33;) nor can a feme covert, by a contract or ordinary deed: (*Oldham v. Hughes*, 2 Atk. 452; *Frank v. Frank*, 3 My. & Cr. 171.) But although, as observed by Lord Hardwicke, in *Oldham v. Hughes*, 2 Atk. 453, "a feme covert cannot alter the nature of money to be laid out in land, *barely* by a contract or deed; for, to alter the property of it, or course of descent, this money must be invested in land, (and sometimes sham purchases have been made for that purpose,) and she may then levy a fine of the land, and give it to her husband, or anybody else; there is a way, also, of doing this, without laying the money out in land, and that is by coming into this Court, whereby the wife may consent to take this money as personal estate; and upon her being present in Court, and being examined, (as a feme covert upon a fine is,) as to such consent, it binds this money articted to be laid out in land, as much as a fine at law would the land, and she may dispose of it to the husband, or anybody else; and the reason of it is this, that at law, money so articted to be laid out in land, is considered barely as money, till an actual investiture, and the equity of this Court alone views it in the light of a real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land; and if the wife has craved aid of this Court, in the manner I have mentioned, she might have changed the nature of this money which is realized, but she cannot do it by deed."

The necessity of making the sham purchases alluded to by Lord Hardwicke, caused much inconvenience, which was attempted to be remedied by 39 & 40 Geo. 3, c. 56, and subsequently by 7 Geo. 4, c. 45; but these statutes have been repealed by stat. 3 & 4 Will. 4, c. 74, whereby a married woman can, by deed executed in compliance with its provisions, make her election to take or dispose of money to be laid out in land. (See 3 & 4 Will. 4, c. 74, and 1 Hayes's Intro., 4th ed., 186; see also *Forbes v. Adams*, 9 Sim. 462.)

So, likewise, a married woman may by a similar deed elect to take real estate directed to be converted into money; (*May v. *Roper*, 4 Sim. 360; and *Briggs v. Chamberlain*, 11 Hare, 69; sed vide *Hobby v. Collins*, 4 De Gex & Sm. 289,) even though her interest is reversionary: *Tuer v. Turner*, 20 Beav. 560.

Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, none of them, as is laid down in the principal case, have a right to say that any part shall not be sold, and elect to take his share in land; for, to allow election in such a case, would be injurious to the sale of the entirety: *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 484, 494; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightley*, 6 Madd. 134; *Holloway v. Radcliffe*, 23 Beav. 163, 171.

But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole: *Seeley v. Jago*, 1 P. Wms. 389; *Walker v. Denne*, 2 Ves. jun. 182.

A remainderman may elect, but not so as to affect the interests of the owners of prior estates: *Lingen v. Sowray*, 1 P. Wms. 173; *Pulteney v. Darlington*,

1 Bro. C. C. 223; *Crabtree v. Bramble*, 3 Atk. 680; *Triquet v. Thornton*, 13 Ves. 345; *Stead v. Newdigate*, 2 Mer. 531; *Gillies v. Longlands*, 4 De G. & Sm. 372, 379.

A tenant in tail of money to be invested in land, might, as against his issue, elect to take it in its actual state, and upon his election immediate payment would be made to him by the Court; (see *Benson v. Benson*, 1 P. Wms. 130; *Short v. Wood*, 1 P. Wms. 470; *Edwards v. Countess of Warwick*, 2 P. Wms. 173;) but where there are remainders over, payment would not be made to the tenant in tail except by the consent of the remainderman: *Trafford v. Boehm*, 3 Atk. 440. "Upon a bill by tenant in fee," says Lord Hardwicke, "the Court would decree it to be paid in money, because he might immediately sell the land, and turn it into money; and the old rule was, that the Court would also decree it so upon a bill by tenant in tail, with remainders over. And thus it stood, till the case of *Colwell v. Shadwell*, 1 P. Wms. 471, 485, where Lord Cowper held, the remainderman should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of the tenant in tail in that case, before a recovery, showed the remainderman's interest in so glaring a light, that it has established the precedent ever since. But where the remainder can be barred by fine, the Court will decree it in money:" *Cunningham v. Moody*, 1 Ves. 176. See, now, 3 & 4 Will. 4, c. 74, s. 71, which [*686] enacts, "that money to be *invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of this act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall apply to such money, in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled."

How election may be made.—Supposing, the person competent to elect, election may be made either by express declaration, or by acts from which the Court will presume an election to have been made.

An express declaration to elect may be made by parol, according to the opinion of Lord Macclesfield in *Edwards v. The Countess of Warwick*, 2 P. Wms. 174; but in *Bradish v. Gee*, Amb. 229, Lord Hardwicke said, that although very slight evidence of the intention to elect would be sufficient, he could not admit that a parol declaration would be sufficient, as was intimated by Lord Macclesfield in *Edwards v. The Countess of Warwick*. However, in *Chaloner v. Butcher*, cited 3 Atk. 685, where the dispute was between the representative of personal estate and an heir-at-law, money on mortgage was agreed to be laid out in land for the husband for life, for the wife for life, and if no issue, for the husband absolutely, who, after the wife's death without issue, declared it should not be laid out in land; the Court held, if the question concerned the right of a third person, the declarations of the husband should not be read; but as it was between his personal and real re-

presentative, they should be read, and determined it upon the declaration only. See, also, *Pultney v. Lord Darlington*, 1 Bro. C. C. 237; *Wheldale v. Partridge*, 8 Ves. 236, where both Lord Thurlow and Lord Eldon consider that election may be declared by parol. The dictum, therefore, of Lord Hardwicke to the contrary may be considered as overruled.

Where a person entitled absolutely, or subject to a preceding life interest, to a fund to be invested in the purchase of land, bequeaths it by the description of so much money agreed to be laid out in land, this bequest will show a sufficient intention to elect to take the fund as personalty; and, therefore, being divested of the real uses, it would, previous to the late Wills Act, 1 Vict. c. 26, have passed to the legatee, although the will was unattested; but without such a particular interposition of the testator manifesting his intention, it would remain as land, and would consequently belong to *the devisee or representative of the real, not of the personal estate. See *Pultney v. Darlington*, 1 Bro. C. C. 235, 236; 3 P. Wms. note (c), and cases there cited. [*687]

The presumption that a person has made an election will arise from very slight circumstances: *Pultney v. Darlington*, 1 Bro. C. C. 238; *Van v. Barnett*, 19 Ves. 109; *Cookson v. Cookson*, 12 C. & F. 121; *Dixon v. Gayfere*, 17 Beav. 433. Thus, if a person keeps land unsold, a presumption will arise that he elected to take it as land: *Ashby v. Palmer*, 1 Mer. 301; *Crabtree v. Bramble*, 2 Atk. 688; *Inwood v. Twyne*, 2 Eden, 148; but in *Kirkman v. Miles*, 13 Ves. 338, where the persons entitled to the proceeds to arise from the sale of land had entered upon and occupied it for two years, and neither they nor the trustees had taken any steps to sell the estate, nor had they made any requisition to the trustees for that purpose, Sir William Grant, M. R., held, "that only two years was too short to presume an election." In *Davies v. Ashford*, 15 Sim. 44, real estates were, by marriage settlement, conveyed to trustees, in trust to sell, and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely; there was no child of the marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement; and they, having advised him that he was entitled to the whole beneficial interest in the estate, he got possession of the settlement and of the title-deeds, and remained in possession of them, and also of the estates, until his death. It was held by Sir L. Shadwell, V. C., that he thereby had elected to take the estates as land. "I admit," said his Honor, "that the settlement contained a clear trust for sale, which must have been exercised unless the husband did some act which showed that he meant the trust to be at an end, and to take the estates as land. It does not distinctly appear in whose custody the title-deeds originally were; but it is clear that there was a change in the possession of them, and that the husband got them into his custody. Now, was not that, of necessity, a destruction of the trust; for the trustees could not have compelled the husband to deliver up the deeds, and without doing so, they could not have made any effectual sale of the estates. There-

fore, it seems to me, that, by consulting upon his rights under the settlement, and then taking the deeds into his possession (from whom or by what means he obtained them is immaterial,) he made a clear election to take the estates as land."

Although a person entitled to an *immediate* interest in land directed by a will to be sold has, by *his acts, shown his intention to reconvert and [*688] take them in their actual state, this doctrine will not be applicable to lands devised by the same will, if the direction to convert only comes into operation *after* a life interest still in existence, for he would not by his acts, with reference to the lands in possession, have shown his intention to reconvert those to which he was only entitled in remainder. See *Meredith v. Vick*, 5 W. R. 639, M. R.

Where securities for moneys were assigned to trustees, to be invested in land to be settled upon a man and his wife for life, with an ultimate limitation to the man's right heirs; and the husband died after some of the money had been put out upon other securities, in trust for him, "*his executors and administrators*," Lord Keeper Harcourt held, that the husband had elected to take the securities as personal estate, upon the ground that the placing the money out upon different trusts was an alteration of the nature of it, since the testator's declaring the trust to *his executors and administrators*, seemed tantamount with his having declared that it should not go to his heirs; *Lingen v. Sowray*, 1 P. Wms. 172. See also *Cookson v. Cookson*, 12 C. & F. 121; *Harcourt v. Seymour*, 2 Sim. N. S. 12.

Upon the same principle, in the case of land to be converted into money, Lord Hardwicke held, that a grant of a lease, reserving rent to the grantor, *her heirs and assigns*, was strong evidence of the intention of the grantor to elect that it should continue as land. His Lordship observed, that the grantor had reserved rents to herself, *her heirs and assigns*, and that it was said by the plaintiff's counsel, that she could not do otherwise, and that it was very true that she could not; yet, though she could not reserve otherwise, there was equal reason in the present case to hold it as her intent that it should go to her heir, as in *Lingen v. Sowray*, to the executors, and that would be sufficient to determine the question between the representative of the personal estate, and the heir: *Crabtree v. Bramble*, 3 Atk. 680, 689. See also *Griesbach v. Fremantle*, 17 Beav. 314.

Where the person absolutely entitled to money to be laid out in land receives the money from the trustees, he elects to take it as money: *Pulteney v. Lord Darlington*, 1 Bro. C. C. 238; *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. 461.

These remarks may be concluded with the observation, that the doctrine of conversion proceeds upon the principle, *that equity considers what ought to be done as done*. It follows, therefore, that the neglect of trustees to perform their duty, either by converting land into money or money into land, will not [*689] affect the rights *of others. "The forbearance of the trustees," says Sir J. Jekyll, M. R., "in not doing what it was their office to have done, shall in no sort prejudice the cestuis que trust, since at that rate it

would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons, which can never be maintained. Wherefore, the rule in all such cases is, *that what ought to have been done shall be taken as done*; and a rule so powerful it is as to alter the very nature of things, to make money land, and on the contrary, turn land into money:” *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215.

The authority of the principal cases has been repeatedly recognized in the American courts, and the doctrine established by it may be regarded as received generally throughout this country. A leading case is *Craig v. Leslie*, 3 Wheaton, 564, where the subject was ably and thoroughly discussed. The question, there, was, whether lands devised, with personal estate, to be sold, and the proceeds of the whole given to an alien, amounted to a bequest of money, which an alien could take, or to a devise of land, which he could not take, and the decision was in favor of the former. “Were this a new question,” said Washington, J., in delivering the opinion of the court, “it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of lands directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is

intended to be made. In the case of *Fletcher v. Ashburner*, (1 Bro. Ch. Cas. 497,) the Master of the Rolls says, that ‘nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given.’ He adds, ‘the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally.’ This declaration is well warranted by the cases to which the Master of the Rolls refers, as well as by many others. (See *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, Ib. 358; *Trelawney v. Booth*, 2 Atk. 307.) The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance.”

The same principle is re-affirmed in *Peter v. Beverly*, 10 Peters, 534, 563. See, also, *Taylor et al. v. Benham*, 5 Howard’s Sup. Ct. 234, 269.

This doctrine will be found laid

down in almost the same language in *Smith v. M'Crary*, 3 Iredell's Eq. 204, 207; *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117, 121, 122; *Tazewell et al. v. Smith's Adm'r*, 1 Randolph, 313, 320; *Pratt v. Taliaferro*, 3 Leigh, 419, 421, 427; *Siter, Price & Co. v. M'Clanachan et als.*, 2 Grat-tan, 280; *Hurt v. Fisher*, 1 Harris & Gill, 88, 96; *Leadenham v. Nicholson*, Ib. 267, 277; *Gott v. Cooke*, 7 Paige, 523, 534. "Upon the principles of equitable conversion," said the chancellor, in *Lorillard v. Coster*, 5 Id. 173, 218, "money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money, is, in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted; so far as the purposes for which such conversion is directed to be made are legal, and can be carried into effect. The same principle is also applicable to the case of a direction in a will to sell one piece of land and to convert it into another, for the purposes of the will, by investing the proceeds of the sale in the purchase of such other lands, under a valid power in trust to make such sale and re-investment. The whole doctrine of equitable conversion depends upon the well established and familiar principle, that a court of equity looks upon that as done, which the parties to an agreement, or marriage settlement, have contracted to do, or which the testator by his will has directed to be done; so far as the contract of the parties, or the will of the decedent, could have been carried into effect, without violating any equitable principle or rule of law." The general

doctrine is vindicated at some length in *Kane v. Gott*, 24 Wendell, 641, 660.

The principle, that in equity, land directed to be converted into money, or money directed to be converted into land, is to be treated as that species of property into which the one or the other is so directed to be converted, was fully adopted in Pennsylvania, in *Allison, Executor of Henderson*, v. *Wilson's Executors*, 13 Sergeant & Rawle, 330, 332, and was vindicated, in point of reason, with great force, by Chief Justice Gibson, in *Morrow, for the use of the Heirs of Isett*, v. *Brenizer*, 2 Rawle, 185, 189; and has ever since been fully maintained in that State; *Burr v. Sim*, 1 Wharton, 252, 262; *Willing v. Peters*, 7 Barr, 287, 290. The courts of Kentucky, though they do not reject the principle, obviously regard it with disfavor: see *Clay and Craig v. Hart*, 7 Dana, 1, 11, 12; *Samuel v. Samuel's Ad's, Heirs, &c.*, 4 B. Monroe, 245, 253.

A devise of land to be sold, or of money to be laid out in land, works a conversion from the death of the testator: see *Van Vechten v. Van Vechten*, 8 Paige, 106, 124, 129. If the conversion is absolutely directed, it matters not that the time of the sale is postponed. A devise of lands to be sold, after a life estate arising under the will, and the proceeds distributed to certain persons, is a pecuniary bequest to those persons, vesting from the death of the testator; *Fairly v. Kline*, Pennington, 754; *Reading v. Blackwell*, Baldwin, 166; *Rinehart and Wife v. Harrison's Executors*, Ib. 177; *Laftis v. Glass*, 15 Arkansas, 680. "The general rule is, to date the conversion as taking place on the death of the testator; unless there is

something special in the power of sale, making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not. But if the direction is imperative, requiring a sale at all events, and leaving it discretionary only as to the time and manner of selling, then the sale when made, has the same effect, in respect to the rights of parties in interest, as though made immediately :'' *Arnold v. Gilbert*, 5 Barbour's S. Ct. 192, 196.

Hence, where an estate is ordered to be sold, at the death of a widow, and the proceeds divided among the children, the shares of those who die in her lifetime will vest in their personal representatives, and not in their heirs; *Brothers v. Cartwright*, 2 Jones's Equity, 113: a dictum the other way, in *Savage v. Burnham*, 17 New York R. 561, 569, seems to have been unnecessary to the decision of the case, and may be thought not to be law.

An agreement or deed, also, between proper parties, will produce a transmutation in equity, from the time that the agreement takes effect legally: see *Naglee v. Ingersoll*, 7 Barr, 185, 196; *Washington's Ex'or v. Abraham et als.*, 6 Grattan, 66, 76. A conveyance to a trustee, in trust forthwith to buy or sell, for the grantor's benefit, or for the payment of debts, works an immediate conversion; *Loughborough v. Loughborough*, 14 B. Monroe, 549. In *Siter, Price & Co. v. McClanachan et als.*, 2 Grattan, 280, a husband and wife conveyed the equity of a redemption in the wife's land to a trustee to sell for their use and benefit; and it was decided

that the property thereby, in equity, became converted into money, and brought under the control of the husband, as personalty. "The effect of this deed," said Baldwin, J., "was, in the contemplation of a court of equity, to convert the property thereby conveyed from realty into personalty. It is well settled, that land directed or agreed to be sold and turned into money, (upon the principle that what is agreed or ought to be done, is considered as done,) shall be treated as immediately assuming the quality of personalty, and as continuing impressed with that character, until some person entitled to the proceeds, shall elect to take the subject in its original character of land."

It is agreed in the American cases, that Lord Rosslyn's notion, in *Walker v. Denne*, 2 Ves. Jr. 170, 176, that there is no equity as between the heir and personal representative, to have the property in any other form than that in which it actually is at the death of the person through whom they claim, is completely overruled, and that the will of the original testator operates, positively and effectively, upon the subject, such character as he has thought proper to direct: see *Tazewell et al. v. Smith's Adm'r*, 1 Randolph, 313, 321; *Pratt v. Taliaferro*, 3 Leigh, 419, 423, 429; *Craig v. Leslie*, 3 Wheaton, 564, 579.

Conversion of Land into money.—Where land is directed by will to be sold and converted into money, the interest vests in the parties entitled, as personal estate; *Ferguson and Wife v. Stuart's Executors*, 14 Ohio, 140, 146; *Sharpley v. Forwood's Ex'or*, 4 Harrington, 336; *Carr v. Ireland*, 4 Maryland Chancery, 257; *Maddox v. Dent*, Ib. 543; *Collier v. Collier*,

3 Ohio, N. S. 369; *Croom v. Hening*, 4 Hawks, 393; *Loftis v. Gross*, 15 Arkansas, 680. If one of the parties entitled, dies before an actual sale, the fund will go to his personal representative as money, since the party himself would have taken money; *Smith v. M^cCrory*, 3 Iredell's Equity, 204, 207; *Pratt v. Taliaferro*, 3 Leigh, 419, 428; *Washington's Ex'or v. Abraham et als.*, 6 Grattan, 66, 77; *Reading v. Blackwell*, Baldwin, 166; *Marsh v. Wheeler*, 2 Edwards, 157, 160; if the party is a *feme covert*, and she dies at any time after the testator, her husband as her personal representative will take the bequest as personalty; *Hurt v. Fisher*, 1 Harris & Gill, 88, 96; per Coulter, J., in *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117, 127; *Brothers v. Cartwright*, 2 Jones, Equity, 113: see also, *Siter, Price & Co. v. M^cClenachan et als.*, 2 Grattan, 280; *Fairly v. Kline*, Pennington, 754; and upon his death before the sale, it will go to his personal representative; *Rinehart and Wife v. Harrison's Executors*, Baldwin, 177, 187. A person to whom are bequeathed the proceeds of land directed to be sold, has no estate in the land, but only an interest in the execution of the trust: he has no such interest in real estate, as can be bound by the lien of a judgment, and a sale of his interest under an execution against the land passes nothing to a purchaser at the sheriff's sale: *Allison, Executor of Henderson, v. Wilson's Executors*, 13 Sergeant & Rawle, 330, 332; *Morrow v. Brenizer*, 2 Rawle, 185, 188; *Hartman's Estate*, 4 Id. 39, 44; *Wintercast and others v. Smith*, Ib. 177, 184; *Stuck v. Mackey*, 4 Watts & Sergeant, 196,

197; *Willing v. Peters*, 7 Barr, 287, 290. Land devised to be sold, and the proceeds given to an alien, or land agreed to be converted into personal estate, is so completely personal estate in equity, that an alien is capable of taking the full benefit of the property; *Craig v. Leslie*, 3 Wheaton, 564; *Anstice v. Brown*, 6 Paige, 448; *De Barante v. Gott*, 6 Barbour, S. Ct. 493, 497: see, also, *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117. If land be directed to be converted into personal estate, the will, in respect to the dispositions, must be governed by the rules of law applicable to limitations of personal property; *Burrill v. Shiel*, 2 Barbour's S. C. 459, 470.

Upon the principle of equitable conversion, the purchase-money of lands contracted to be sold during the lifetime of the testator, whether paid before his death or afterwards, is a part of his personal estate; and if not legally bequeathed by the will, will be distributed to the widow and next of kin, as personal assets; *Hawley v. James*, 5 Paige, 323, 456; *Drenkle's Estate*, 3 Barr, 377; *Henson v. Ott*, 7 Indiana, 512. The legal title, however, still remains in the vendor, and will be bound by the lien of a prior or subsequent judgment, exactly as if no sale had been effected, except that when the judgment is subsequent, it will be subject to the right of the vendee to have the land, free from incumbrance, on paying the purchase-money; *Leiper's Executors v. Irwin*, 2 Casey, 55. Even, therefore, when the land is sold under a judgment, prior to the sale, the right of subsequent judgment-creditors will be limited, to the purchase-money unpaid at the time when their judgments

were obtained; and any surplus over this will belong to the vendee, as being the proceeds of his estate or interest in the land; *Siter's Appeal*, 2 Casey, 178.

Conversion of Money into Land.—Money directed to be laid out in land, and held on certain trusts, must be considered and treated as real estate, for the purpose of deciding on the validity of the settlement directed; *Hawley v. James*, 5 Paige, 323, 443; *Gott v. Cook*, 7 Id. 523, 534; *Collins v. Champ*, 15 B. Monroe, 118.

The question of conversion depends on the intention of the testator, which need not be expressly declared, but may be derived from the general effect of the will; *Burr v. Sim*, 1 Wharton, 252, 262. But, to operate as an immediate conversion from the testator's death, the direction to convert for the purposes intended, must be absolute and peremptory; *Arnold v. Gilbert*, 3 Sandford, 533, 556. A contingent power, or direction, or agreement to convert, does not affect an immediate, equitable conversion; *Naglee v. Ingersoll*, 7 Barr, 185, 196, 197; *Harris v. Clark*, 3 Selden, 248; *Dominick v. Michael*, 4 Sandford's Sup. C. 374; nor does a discretion to executors to sell, if they think proper, or to sell any land which they think proper, work a conversion before the discretion is determined by a sale; *Blight v. Bank*, 10 Barr, 131; *Clay & Craig v. Hart*, 7 Dana, 1, 11; *Samuel v. Samuel's Ad's, Heirs, &c.*, 4 B. Monroe, 245, 253; *Allen v. De Witt*, 3 Comstock, 276; *Clinefelter v. Ayres*, 16 Illinois, 329; *Montgomery et ux. v. Milliken et ux. et al.*, 1 Smedes & Marshall's Chancery, 495, 498; *Pratt v. Taliaferro*, 3 Leigh, 419, 430. [And the same result will

follow when the sale is made dependent on the election of third persons, or of those to whom the proceeds are bequeathed; *Henry v. M'Closkey*, 9 Watts, 145; *Nagle's Appeal*, 1 Harris, 260; *Stoner v. Zimmerman*, 9 Id. 394. Thus, in *Stoner v. Zimmerman*, a direction that real estate should "be sold at the expiration of fourteen years, if it was the wish of the testator's children, at the time, to have it so," was held not to deprive it of the character of realty, nor to prevent it from passing as such, by descent, to the heirs until sold; although a sale was ultimately made in accordance with the directions of the will. In *Nagle's Appeal*, the testator after giving an estate to his wife, during widowhood, devised as follows: "At her decease, it is my desire, if the majority of my children be agreed, that my executors shall sell all my real estate, (the house in Marketstreet excepted, which house I would not wish to be sold until three years after my wife's decease, if the majority of my children be agreed,) and give unto my son John \$500, money borrowed from him." He then desired his executors to give \$500 to each of his seven children, out of the proceeds of his real estate, and directed the residue to be equally divided between them, in three years after receiving the \$500; but "if any of the children did not make a good use of the \$500, the executors were to keep the residue, to administer it as their necessities required." And the court were of opinion that the provisions thus made, made the question of sale dependent on the election of a majority of the children, and, consequently, did not work a conversion, notwithstanding the objection that the bequest of the proceeds constituted a trust in which all were in-

terested, and which the testator could not have intended to have left to the wish or opinion of a majority of the legatees, whose interests might be different from those of the minority, and that the discretion must, consequently, have been meant to be confined to the time of sale, and not to defeat the right of the executors to make it. And whatever may be thought of this decision, it is plain that even when the sale is discretionary, and the direction to sell, consequently, reduced to a mere power, still, if the power be coupled with a trust, equity will hold the sale obligatory, and conversion will follow as a necessary consequence, *ante*.]

Where the direction or intention to sell is absolute and certain, but the time of sale is discretionary with the executors or trustees, the question of equitable conversion has been differently determined in different courts. In *Christler's Executors, &c. v. Meddis, Adm'r*, 6 B. Monroe, 35, a devise of land to a trustee, "to be by him sold at any time he may think best," was held not to effect a conversion from the testator's death. "Real estate," said Ewing, C. J., "is converted into personalty, immediately on the death of the deviser, only where the direction to sell is positive, without limitation as to time, and without discretion on the part of those to whom the power to sell is delegated. If discretion is given, as in the case before us, the conversion does not take place until the sale is made." But the weight of authority is the other way, and in favor of the principle that if the direction to sell is absolute, a discretion as to time and manner, will not suspend the conversion. In *Tazewell et al. v. Smith's Adm'r*, 1 Randolph, 313, 319, 320, a testator had

directed all his estate, real and personal, to be sold by his executors or such of them as shall qualify, "at any time, and in any manner, he or they shall think proper," and the income of the proceeds to be distributed between his two sons. It was decided that an immediate conversion in equity took place, and that the discretion as to the time of sale had no effect upon the question. "In every instance of a sale by an executor," said Cabell, J., "some time must, of necessity, elapse between the death of the testator and the sale; and something is almost invariably left to the discretion of the executor, as to the time of selling. Yet that makes no difference where, as in this case, the direction to sell is imperative. . . . The important question is, whether the character of land or money is definitely and imperatively affixed, by the will, to the property; for, the character thus impressed upon it, will remain so impressed, until some person having a right to elect, elects to take it in its original character. *Ashby v. Palmer*, (1 Mer. 296; 2 Mad. 108-110, and the cases there cited.) Land, therefore, thus impressed with the character of money, will, until election be made to take it as land, pass as money, although it has not been actually converted into money. The counsel for the appellants relied upon the principle laid down in *Walker v. Denne*, (2 Ves. 170,) that the property will pass according to the state in which it happens to be at the death of the person from whom it is claimed. But that principle has been repeatedly overruled; *Weldale v. Partridge*, (8 Ves. 227;) *Biddulph v. Biddulph*, (12 Id. 161;) *Kirkman v. Miles*, (13 Id. 338;) *Ashby v. Palmer*, (1 Mer.

296.) The other cases relied on have no application. In all of these, there was, from some cause or other, a resulting trust, in whole or in part, for the heir-at-law of the testator. But, in the case before us, the conversion into money is imperative, *to every intent, out and out*; and the whole proceeds of sale, after payment of debts, are given as personal property to the two sons of the testator." In like manner, in a case in New York, where a testator directed his executors, all, or such of them as might undertake the trust, after paying legacies, "to sell and dispose of the remainder of his estate, both real and personal, to the best advantage in their power, and as sound discretion directs," and divide the whole proceeds equally among his children, it was held that an absolute conversion took place from the testator's death. "Under this clause," said the assistant vice-chancellor, "although there was a discretion as to the time of sale, the direction to sell the real estate was absolute and imperative. It was only after such sale that it could be divided, or indeed that it was to be received by the children. The gift to them was not of land, but of the proceeds of land to be sold, and of personal estate. Thus, the quality of personalty was given to the produce of this real estate *to all intents*; and not merely for any particular purpose of the will. There was, therefore, an equitable conversion of this real estate, and it is to be considered in this court, as having been personal property for all the purposes of the will:" *Martin v. Sherman*, 2 Sandford, 341, 343. Again, where a testator devised and bequeathed to his executors, all his estate, real and personal, to sell such estate or any part

of it, whenever they should think fit, with authority to lease; and gave directions as to the disposal of the proceeds of the sale or leases, it was held that a conversion took place from the testator's death. "The intent and direction of the testator to sell the land was absolute, or 'out and out' for all purposes," said Jewett, Ch. J., in the Court of Appeals. "The discretion of the executor in respect to the sale, related merely to the time when, &c.:" *Stagg v. Jackson*, 1 Comstock, 206, 212.

When the direction to sell is for a particular purpose only, it may frequently happen that a direction as to time will be connected with a contingency as to the fact of sale: but where the real estate or a general residue of it is mixed up with the personal estate, and the whole ordered to be converted into money, for distribution to persons surviving the testator, the intent to convert is absolute, and the fact of an ultimate conversion, if not arrested by election, is certain; and in such a case, a discretion as to time or manner is without influence upon the question. [A conversion will, moreover, result from a covenant or agreement to sell or convey, whenever the vendor is absolutely bound to make deed, if the purchaser requires it, although the latter may have a right to complete the purchase or decline it as he thinks proper; because his election, when made, will result back to the agreement, and render the sale absolute from the beginning; *Townley v. Bedwell*, 14 Vesey, 591; *Ely v. Beaumont*, 5 S. & R. 524; *Kerr v. Day*, 2 Harris, 112; *D'Arras v. Keyser*, 2 Casey, 249.]

Election.—It is well settled, that the party, or all the parties, interest-

ed, may elect to take the property in that character, from which the testator has directed it to be converted; and upon such election being declared, the property is converted back into its original condition. Land ordered to be sold, if the parties elect to take it as land, becomes real estate again and is bound by a judgment; *Stuck v. Mackey*, 4 Watts & Sergeant, 196; *Shallenberger v. Ashworth*, 1 Casey, 152; *Brownfield v. Mackey*, 3 Id. 320; *Beal v. Stockly*, 9 Harris, 336; *Broome v. Curry*, 19 Alabama, 805. The property is considered in equity as being completely converted, upon the testator's death, and as continuing in that state, until competent parties, by legal and sufficient acts or declarations, determine their election to have it in its former character. This right of election, is given merely for the convenience of the parties, and upon the ground, that as they might, after an actual conversion, reconvert the property into its former quality, equity will for their benefit, and upon a proper manifestation of their intention, consider the re-conversion as effected. "Where the whole beneficial interest," says Washington, J., in *Craig v. Leslie*, 3 Wheaton, 564, 578, "in the money in one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has been actually made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere

right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest." "This right of election," says Gibson, J., in *Allison v. Wilson's Executors*, 13 Sergeant & Rawle, 330, 333, "must be exercised before the property is converted; and until it be actually exercised, the property bears the same character, and remains subject to the same rules of transmission to representatives as if the conversion were actually made." "Land once impressed with the character of money," says Rogers, J., in *Burr v. Sim*, 1 Wharton, 252, 265, "must remain so impressed, until some person elects to take it in its original character as land. . . . It is certain, that the devisee may take it himself in the shape of land or money; but when there has been a conversion in the contemplation of the court, the *onus* of showing that the property ought to pass under a different denomination, by proving an act in the donee, indicating his intention to that effect, lies on the party who claims it in its original state." And as the inherent right of election will not, unless exercised, arrest the original conversion, or work a re-conversion, so an express right of election to take the property in its unconverted shape will not, till exercised, prevail over a direction to convert; *Pratt v. Taliaferro*, 3 Leigh, 419.

An infant cannot make an election so as to change the character of property, nor can his guardians; *Burr v. Sim*, 1 Wharton, 252, 265: though a court of equity may elect for him; *Turner v. Street*, 2 Randolph, 404; *Pratt v. Taliaferro*, 3 Leigh, 419, 428. A feme covert cannot elect, by *

a simple declaration or act *in pais*; and it has been held in Virginia, that her husband cannot elect for her, but that she may make a valid election under a commission from the court of chancery, directing her privy examination separate and apart from her husband: by analogy to the solemnities attending the levy of a fine in England, or the privy examination of a feme covert in that state; *Pratt v. Taliaferro*, 3 Leigh, 419, 429, 432; *Siter, Price & Co. v. McClanachan et als.*, 2 Grattan, 280, 296: in Kentucky, also, it is considered, that where the testator's will has made a conversion of land into money, the husband of a feme covert cannot have the property conveyed to him, so as to deprive his wife of her equity to a settlement; *Samuel v. Samuel's Administrators, Heirs, &c.*, 4 B. Monroe, 245, 257. In Pennsylvania, however, it has been decided, that where land is directed to be sold, and the proceeds, or a part of them, to be given to a feme covert, the right of election is in the husband, who may take the property as land vesting in the wife or in himself, as he pleases; *Hannah v. Swarner*, 3 W. & S. 224, 231; *Beal v. Stockley*, 9 Harris, 376; *Shellenberger v. Ashwater*, 1 Casey, 152. An election can be made only by all the parties interested: a part cannot, without the co-operation of the rest, change the character which a testator has fixed upon the property; *Allison v. Wilson's Executor*, 13 Sergeant & Rawle, 330, 333; *Willing v. Peters*, 7 Barr, 287, 290; *Miller v. Meetch*, 8 Id. 417; *Pratt v. Taliaferro*, 3 Leigh, 419, 428; *Beatty v. Byers*, 6 Harris, 105; *Foreman v. Foreman*, 7 Barb. 215.

Election depends upon the intention of the parties interested; and it

may be determined by slight acts, if they be such as to manifest intention unequivocally; *Pratt v. Taliaferro*, 3 Leigh, 419, 428. If land be directed to be sold, and the proceeds distributed among certain persons, and they all unite in a conveyance of the property, as land, it is an election to take it as land; *Smith v. Starr*, 3 Wharton, 62, 65; *Rice v. Bixler*, 1 Watts & Sergeant, 445, 455; and the same result will follow from a conveyance by one of his share to the others, if accepted by them; *Beal v. Sheahly*, 9 Harris, 376, or from a devise of the property as land, by the party beneficially interested; *Burr v. Sim*, 1 Wharton, 252, 265. An agreement among all the parties to hold the land in the proportion of the money bequeathed to them, would also be a binding election to take as land; *Hannah v. Swarner*, 3 Watts & Sergeant, 224, 231. And election may be proved as any other matter *in pais*, and a parol agreement to take as land, and an entry and possession accordingly, will be sufficient; *Stuck v. Mackey*, 4 Id. 196. An election cannot, however, be deduced from silence in the absence of circumstances making it a duty to speak, and the burden of proof lies on those who allege, and not on those who deny its existence; *Miller v. Meetch*, 8 Barr, 417; *Beatty v. Byers*, 6 Harris, 105.

Where an absolute equitable conversion has taken place, as where land is devised to trustees, to be sold, and the money arising therefrom to be distributed, and the party interested is the heir, and he elects to take it as land, he takes by purchase and not by descent; and the land, in his hands, is regarded as a new and original acquisition. For, the effect of an elec-

tion is not to discharge, or annul the conversion directed by the testator, but to consider the land as actually converted under such direction, and then actually re-converted by a new purchase on the part of the beneficiary. By election, chancery regards the re-purchase as really made, and with all the consequences of an actual re-purchase. In *Morrow v. Brenizer*, 2 Rawle, 185, 189, a sale of land for distribution among children had been directed by the testator. "It was necessary to the purposes of the will," said Gibson, C. J., "that the quality of their interest should be changed; and they could, therefore, take only by purchase. They might, indeed, have elected to take the land itself, instead of the price of it. But their right, in this respect, is a consequence of their power to control the event, being the only parties beneficially interested. As they can produce the same result, by purchasing at the sale of the trustees, chancery considers them as having an equitable estate in the land, and directs the trustees to convey the title, the moment they signify an intention to call for a conveyance; an actual sale being dispensed with, as an unnecessary formality. But, even then, an estate in the land is not vested by descent, but by an

act of their own, which is equivalent to a purchase." In *Burr v. Sim*, 1 Wharton, 252, 266, where a testator devised his real estate to be sold and the proceeds given to his son and heir, and the latter elected to take the devise as land, it was decided that he was in by purchase and not descent, and that the lands went to his heirs *ex parte maternâ* as well as those *ex parte paternâ*. "Did this property in legal contemplation as land, come to the devisee from his father?" said Rogers, J. "We think it did not. It came to him impressed with the character of money. It was by an act of his own that it was reconverted into land. The very act of election implies a choice between the two species of property, and effects a change in the nature of the property itself. If the property had been sold by the executors in pursuance of the directions of the will, and the devisee had become the purchaser, as he might, there can be no doubt that it must be viewed in the light of a new acquisition. Where then can be a difference, when by an act of his own he elects to consider that as land, which otherwise has the impress fixed upon it as money. It is a purchase of it as land, by a surrender of the right which he undoubtedly had to consider it as money."

EQUITABLE CONVERSION.

*ACKROYD v. SMITHSON.¹

[*690]

LINCOLN'S-INN HALL, MARCH 4, 1780.

REPORTED 1 BRO. C. C. 503.

RESULTING TRUST ON FAILURE OF THE PURPOSES FOR WHICH CONVERSION HAS BEEN DIRECTED.]—*Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed; and, so far as they are constituted by personal estate, shall go to the next of kin, and so far as they are constituted of real estate, to the heir-at-law.*

CHRISTOPHER HOLDSWORTH, by his will gave (int. al.) to the defendants, Smithson and Ibbetson, their executors and administrators, £200, in trust to put the same out at interest, and to apply the interest in bringing up the defendant Mary Bracklebank, then an infant, till twenty-one, the principal to be paid to her at twenty-one; and, if she died before twenty-one, then to be paid to her representative: and bequeathed to the Rev. Thomas Whitaker, £100, to James Roberts and William Roberts, £100 each; to Grace Ogle, £200; to George, Ann, and Phœbe Ogle, her children, £100 each; to Joseph Scurr, £200, to Benjamin Wright, £200, to Mrs. Molyneaux, £400, to Hannah Close, £150, to William Hawkeswell, £100, to Mary Ross, £200, to Joseph Marshall, £200—all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator thereby gave all his messuages, cottages, lands, tenements, and hereditaments, *situate at the Bank, in the township of Leeds, [*691] with their appurtenances, and all his real estate not thereinbefore devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants Smithson and Ibbetson, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns, for ever, *in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c., for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, and retaining to themselves £50 each,*

¹ This report was copied by Mr. Brown from the notes of Lord Eldon.—From Lord Redesdale's MSS.

which he thereby gave them for their trouble, in trust out of such moneys to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after all such payments made, and putting out of the funds, as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them should, within six months after the same should be ascertained, pay the same unto his said legatees, Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phœbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneaux, H. Close, William Hawkeswell, Mary Bracklebank, Mary Ross, and Joseph Marshall, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of £250 each, which he had therein directed to be put out on securities in the names of his trustees, [*692] and the interest arising therefrom, to be respectively paid to *M.

Thackeray and R. Gaunt during their respective lives, should, upon the several deaths of them the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneaux died in the lifetime of the testator.

The bill was filed by the next of kin of the testator against the surviving legatees and the heir-at-law, claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of £250, as lapsed and become part of the personal estate of the testator.

The cause came on at the Rolls, 10th July, 1778, when his Honor, (Sir Thomas Sewell,) being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to the Lord Chancellor Thurlow, and, the cause coming on to be heard before his Lordship,

Mr. *Kenyon* attempted to support the decree.

But Lord Chancellor Thurlow being clear, (without hearing much argument,) that this was a tenancy in common in the residue, and that, therefore, the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question was, whether such shares belonged wholly to the next of kin or to the heir-at-law.

The *Attorney General*,¹ Mr. *Madocks*, and Mr. *Selwyn*, (for the plaintiffs, the next of kin,) contended, that the testator had converted his real estate into money out and out; that he had mixed two funds, and made all personal estate; that the cases, therefore, of *Mallabar v. Mallabar*, For. 79, and *Durour v. Motteux*, 1 Ves. 320, must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard*, cited 1 Bro. C. C. 501. Mr. *Selwyn* mentioned the cases of *Flanagan v. Flana-*

¹ Alexander Wedderburne, Esq., afterwards Earl of Rosslyn.

gan, (cited 1 Bro. C. C. 500,) *Fletcher v. Ashburner*, *(1 Bro. C. C. 497,) and *Ogle v. Cook*, (cited 1 Bro. C. C. 501.) [*693]

Lord Chancellor Thurlow thought the two former cases did not apply, but being in general of opinion with the counsel for the next of kin, asked the counsel for the heir-at-law upon what grounds they could support his claim.

Mr. *Scott*,¹ for the heir-at-law, said, they claimed on his behalf such interest in the moneys produced by the sale of the testator's real estates, as the deceased residuary legatees would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take; he must make a disposition in favor of another; if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *à fortiori* in a case where he has expressed no intention, to the hæres natus. If the interest of the deceased legatees had been an interest in the produce of mere real estate not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of lapsed devises would, according to the case of *Digby v. Legard*, and the principle of the case of *Embllyn v. Freeman*, Prec. Ch. 541, and of many others, have accrued to the heir-at-law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law shall take; because there is an end of the *disposition when there is an end of the purposes for which it was made; but it is contended, here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate; that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases, therefore, of *Durour v. Motteux*, and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives. But we insist, that if he has not actually and eventually so decided, they, upon whom the law casts the title to personal estate, can no more claim in a court of equity money arising from the sale of land, than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that, in some event only, or that, in all events, the produce of his real estates should be considered as personalty, we admit that, in favor of his residuary legatees, he meant to convert the whole into

¹ Afterwards Earl of Eldon, from whose notes this argument is taken.

personalty, in case all his residuary legatees should eventually take the whole; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property, which his legatees were to take; but, as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place, which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but, to say he has made it all personal property, [*695] and that therefore the law must give it *to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which had not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favor of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention; though the testator, therefore, intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature, in case that particular intent of his should be disappointed. In the event, therefore, which has happened, it is so much money undisposed of, arising from the sale of lands. Such money in this Court is land, and as such the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that, because he had made the real estate personal, to give it to his residuary legatees, and to disappoint his heir, he meant also to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his next of kin and his heir-at-law, but it proves a purpose hostile to both. Can that fact, then, be a ground from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty [*696] to the next of kin, and *adverse to the interest of the heir only? The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property; but if, in the event, the law was to make the disposition of any part of

the property, he meant, for aught that appears to the contrary, (and something must appear to the contrary, to defeat the claim of the heir,) that the law which made the disposition should decide on the qualities of the property of which it was to dispose. If, then, in case all the residuary legatees had died, the heir could have prevented a sale, is it to be said, that, because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblyn v. Freeman*, Prec. Ch. 541, the heir was held entitled to £200 arising from the sale of real estate, which the testator had made liable to an appointment by note, concerning which he made no appointment; and there a sale was necessary. In the case of *Digby v. Legard*, where the heir was held entitled to the benefit of the devise, lapsed by the death of one of five tenants in common, of money to be raised by sale of real estates in the lifetime of the testator, the heir could not possibly prevent a sale; as to the cases of *Mallabar v. Mallabar*, and *Durour v. Motteux*, they can be considered as authorities only by those who do not attend to the distinction submitted above; they are so far from deciding the case, that they establish no principle which applies to it. In *Mallabar v. Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust to sell, and that, out of the moneys arising therefrom, the testator's debts should be paid; *and after payment thereof he devised, out of the remainder of the money, £500 to his [*697] sister, Mary Bainbridge; £500 to his sister's two children that should be living at the time of his decease, equally to be divided between them; £500 to his nephew, Nicolas, who was his heir-at-law; £500 to be divided amongst the children of his late brother, James Mallabar, living at his decease. Then follows the clause which was held to blend the funds:—"Item, after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister Esther Mallabar, and appoint her executrix." The question was, whether there was a resulting trust for the heir, as to the money arising from the sale of the real estate, after payment of the debts and the several sums of £500. The Court held, that the testator had made all his property personal; or rather, it inferred, from the purpose of the testator, as far as that could be collected from the will, that the testator meant by the residuary clause, to describe not only money strictly personal estate, but the money claimed by the heir likewise: the Court inferred this from the circumstance of the heir's having a legacy of £500 out of that very money, and because, if a different construction was made, the sister, his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office: for if the words, "the residue of the personal estate," did not include this money, the personal estate must have been first applied to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have

had an office of trouble, without the benefit intended her. But, though the Court considered the surplus of the money as personalty, as between her (whom it held to be a residuary legatee) and the heir, to effectuate the testator's intention, does it follow that, if the testator had died intestate as to the surplus, as the testator here did as to a part of it, that the Court would have determined against the heir, in favor of the next of kin, in whose favor [*698] no such argument as to intention could *have been urged? If the residuary legatee had died in the testator's lifetime, the will must have had the same construction as if the residuary clause had not been inserted; for, where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will; if it had not been inserted, the devise of the real estate would have been a devise to pay debts and legacies merely. In such case, then, it is clear that, as to the surplus, there would have been a resulting trust for the heir; the debts and the sums of £500 being paid, the testator's intention would have been satisfied to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case and the present case, except that, in that case, there is no residuary legatee as to any part of the surplus; here, there is none as to some part of it: there, there is a general intestacy as to the surplus—here, a partial intestacy: but the effect of a partial intestacy must be the same as to the part, as the effect of a general intestacy is to the whole. The case of *Durour v. Motteux* is also a case between residuary legatees and the heir-at-law. There the testator gave all his real estates, to sell and dispose of the whole with his personal estate, blending them for payment of his debts, legacies, and funeral expenses, and performance of his will; he gave several legacies, and among the rest £1200, or thereabouts, whereof part was to be laid out in the purchase of freehold lands for charitable uses, some of which were confessedly within the Mortmain Act,¹ and the rest determined to be so; the question was, whether the £1200 should go to the heir-at-law, or to the residuary legatees. Lord Hardwicke said, that he was of opinion that the money which should arise by the sale of the real estate was turned into personal, and so intended by the testator, it plainly appearing that, by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this: a will is made in which there are several legacies, and the residue of the [*699] *personal estate is given away; one of the personal legacies is void by law; the Court cannot say, for that reason, that he intended to die intestate, for giving the residue over includes everything; let it fall in by reason of the legacies being void, or lapsing in the life of the testator. Now here the reasoning of the Court is grounded upon the testator's intention to give his residuary legatees everything which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees

could not otherwise take the £1200. But if the residuary legatees had died in the lifetime of the testator, and the next of kin had been called upon to sustain the question against the heir, the reasoning of the Court would not apply; arguments from intention in their favor could not be resorted to, and the Court might have said, and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not in that case have been said that the testator meant, by the description of all his personal estate, to include the whole in the residue, and therefore the void legacy of £1200 among the rest, because the will, in that case, must be considered as if nothing concerning the residue had been inserted in it. Here he meant to make one fund of the whole, to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour v. Motteux*, it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies, and funeral expenses; it would have been then a disposition with a special intention: that intention being satisfied, there would have been a resulting trust as to the surplus. It is said, if this way of reasoning was good, it would have *entitled the heir to the £1200 in [*700] the case of *Durour v. Motteux*; for it was the testator's intention there, that the same sum should be considered as money only in case the charity took it; that the testator never adverted to the event which happened—viz., the residuary legatees taking it—an event which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer, in that case, what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law.¹ So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself he would say, If my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place; but where the residuary legatee is removed, there is nothing like a declaration by the testator in favor of the next of kin, to entitle them to succeed the residuary legatees, as there is where there is a general residuary clause in a will in favor of the persons named in it, to succeed the particular legatees; and to money arising by the sale of land, there can be no claim in the next of his kin but what arises from the declaration of the testator: for, unless he directs or expresses that it shall be considered as personalty, the heir must take it. We admit the heir, then, to be excluded whilst there are any persons who can take the produce of the real estate under the will, the declaration of the testator's intention: we deny that he is excluded by any who make their

¹ See *Cambridge v. Rous*, 8 Ves. 23.

claim not under the will, but in defect of the will : or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse v. Barley and Banson*, before Sir Joseph Jekyll, 3 P. Wms. 20, seems to establish those principles, for it shows that where any part of the produce of the real estate is so given as to

[*701] prove that it was not the *testator's intention, in case that part should lapse, that it should go to the residuary legatees, but that he has given them the residue exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take, in preference to the heir, what the residuary legatees cannot take for another reason—namely, removal by death? The case was : William Banson, seised in fee of freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant Barley and his heirs, in trust to sell for the best price, and in the first place to pay off all his incumbrances and his debts. He also devised his personal estate to the same trustee, in trust to sell, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner thereafter mentioned : to his eldest son £200 at his age of twenty-one, all the rest and residue thereof among his four younger children at twenty-one, and with benefit of survivorship. The eldest son died under twenty-one; the question was, what was to become of the £200? The Master of the Rolls thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected, that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate, is to go to the hæredes facti. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed residuum : but his Honor, after looking into precedents, declared for the heir, that it was the same as if so much land as was of the value of £200 had not been to be sold, but suffered to descend. As to the case of *Flanagan v. Flanagan*, it is perfectly different from this; that was a question between the real and personal representative of a person entitled under the will of the testator. The land was sold under a decree of the Court, in a cause in which the person, through

[*702] whom both claimed, was party; *and the decree had ordered the surplus, if there should be any, to be paid to James Flanagan, the father, and James Flanagan, the son, equally. The sale was made under the decree; and, the question arising between the real and personal representative of Flanagan, the father, the Court determined the surplus should have the same nature with respect to them as the decree had given it with respect to Flanagan the father. In that case, too, the testator had, foreseeing that a sale could not be made which would produce the exact sum and no more, directed his trustees to convey the residue of the real estate which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates between the father and the son.

Scudamore v. Scudamore, Prec. Ch. 513, is not to this point: it deter-

mines, that the representatives of a person entitled under a will, shall take money, as money or as land; according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as entitled against the heir, in the event of a lapse of the whole or a part of the residue, except the case of *Ogle v. Cooke*,¹ heard 19th February, 1748, which, so far as it relates to this subject, was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell and vest the money in stock, and pay the interest to his wife during her widowhood, and, after her death or marriage, the principal to his two daughters equally, except that the eldest was to have £1000 more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance, in trust to sell for payment of his debts, which was held a revocation pro tanto only, and part was sold. One of the daughters died in Mr. Ogle's life. The bill was brought by the widow and the eldest daughter, against the son, the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter as personal estate of Mr. Ogle, to be divided *between them and the son. The [*703] son insisted that her share was to be considered as real estate: the Court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. Ogle's personal estate. Here it cannot be denied, that the intention of the testator to convert this estate into money, for the sake of his daughters, was taken to be a sufficient ground for the Court's considering the moiety, which in the event was undisposed, as personal estate: but the case of *Digby v. Legard* is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of the persons interested in the produce. The daughters, in the case of *Ogle v. Cooke*, indeed, had an interest in the personal as well as real estate, which was not given in that of *Digby v. Legard*; but the funds are kept separate, and not blended, in *Ogle v. Cooke*. The determination in the latter case, we submit, is neither justified by principle nor by authority. The case of *Ogle v. Cooke* admits the deceased daughter's moiety, in both the real and personal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to a disposition, is to take effect, though the disposition does not take effect. Upon the whole, we contend that, if the shares of the deceased legatees in the overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin, do not apply.

LORD CHANCELLOR THURLOW reversed the decree, and directed an account

¹ See *Collins v. Wakeman*, 2 Ves. jun. 686, where Lord Loughborough says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle v. Cooke*, was in reality left undecided. It is, therefore, no longer an authority.

to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir; that is so much of those [*704] shares as was constituted of the personal estate, to the next of kin, and so *much as was made up of the produce of the real estate, to the heir.

He said, that he fully approved the determination in *Digby v. Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale, and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said, he approved the distinctions made in behalf of the heir, and decreed as before.

Since the case of *Ackroyd v. Smithson*, so celebrated for the elaborate argument of Lord Eldon, then Mr. Scott, it has never been doubted, that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result to his heir-at-law, and will not go to his next of kin, although the land may have been actually converted into money. In *Ackroyd v. Smithson*, it will be observed that the disposition of the money to arise from the sale of the real estate was originally complete, but a lapse by the death of two of the residuary legatees in the lifetime of the testator, caused the failure of the disposition as to their two shares, which, although actually converted into money, resulted to the heir-at-law as undisposed of real estate.

So likewise where money impressed with the character of realty, passes under a general devise, although there be a trust for sale, it will operate merely as a conversion for the purposes of the will, and upon a lapse of a share taking place on the death of one of the devisees it will result for the benefit of the heir-at-law, and not the next of kin of the testator. In *Re Taylor's Settlement*, 9 Hare, 596, 604. See, also, *Salt v. Chattaway*, 3 Beav. 576.

Upon the same principle, where a partial disposition only is originally made of the money to arise from the sale of land, the portion undisposed of will result to the heir-at-law: *Robinson v. Taylor*, 2 Bro. C. C. 589; *Berry v. Usher*, 11 Ves. 87; *Wilson v. Major*, 11 *Ves. 205; *Watson v. Hayes*, [*705] 5 My. & Cr. 125.

The same result follows where money arising from land directed to be sold is given over on an event which does not happen. Thus, in *Jessop v. Watson*, 1 My. & K. 665, a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children, or child, at twenty-one, if sons, and twenty-one or marriage, if daughters, and if there was no child

who should become entitled under the trusts, to such person as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter, his heiress-at-law, who died under twenty-one, intestate and unmarried. Sir J. Leach, M. R., held, that so much of the residuary fund as was constituted of real estate descended to the heiress, and that so much as was constituted of personal property went to the next of kin. See, also, *Fitch v. Weber*, 6 Hare, 145; *Roberts v. Walker*, 1 Russ. & My. 752.

So, also, where land is directed to be converted into money, and the whole, or part, is given for a purpose which fails on account of illegality, the whole or part which, on this account, remains undisposed of, results to the heir-at-law. As, for instance, where money, to arise from the sale of land, is given to a charity, and the gift is void according to the Statute of Mortmain, (*Attorney-General v. Lord Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 S. & S. 294; *Hopkinson v. Ellis*, 10 Beav. 169,) or is limited so that the bequest is void, as violating the rule against perpetuities, (*Burley v. Evelyn*, 16 Sim. 290.) So, where, as in *Eyre v. Marsden*, 2 Kee. 564, accumulations are directed to be made out of the income of land to be converted into money, for more than twenty-one years from the death of the testator, and therefore void under the Thellusson Act, (39 & 40 Geo. 3, c. 98,) as to the excess of the accumulation over the twenty-one years, such void accumulations will result to the heir-at-law, and not to the next of kin. "It happens," observes Lord Langdale, M. R., in *Eyre v. Marsden*, "that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as they can be lawfully carried into effect, do not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest." See S. C., 4 My. & C. 231.

The principle upon which these cases proceed has been thus laid down by Lord Eldon: "Where," says his Lordship, "a testator *means, with regard to a particular purpose, to convert his real estate into personal, [*706] if that purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed:" *Hill v. Cock*, 1 V. & B. 175.

In *Ackroyd v. Smithson*, it was argued, for the next of kin, that the fact of the testator having mixed the real with the personal estate, showed an intention on his part to convert the real into personal estate out and out, for all intents and purposes, and not merely for the purposes of the will. This argument, however, was most successfully refuted by Lord Eldon, who, admitting that it was the testator's intention to convert the real into personal estate, out and out, for the purposes of the will, that is to say, for the residuary legatees, contended, that it was impossible to infer from such intention in favor of the residuary legatees, a similar intention in favor of the next of kin, whom the testator never had in contemplation; and that, to argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favor of the next of kin, was to reason from a case in which inten-

tion was expressed, to prove a like intention in a case which supposed the absence of intention.

It was decided, also, in *Jessop v. Watson*, 1 My. & Kee. 667, upon the authority of the principal case, that the blending of the proceeds of real with personal estate for an express purpose which fails, will not operate so as to convert the real into personal estate for a purpose not expressed, viz., so as to give it to the next of kin. The case of *Ogle v. Cooke*, cited in the principal case, was for a long time considered an exception from the general rule; but, in *Collins v. Wakeman*, 2 Ves. jun. 686, Lord Loughborough observes, that he had caused the Reg. Lib. to be searched, and it was found that the point had been left undecided. *Ogle v. Cooke*, therefore, is no authority whatever on this subject.

Upon the same principle, even an express direction that the proceeds of the sale of real estate shall be deemed personalty will not prevent the operation of the rule in favor of the heir-at-law; for however absolute such direction for conversion may be, it will be construed to extend to the purposes of the will only. See *Collins v. Wakeman*, 2 Ves. jun. 683; *Countess of Bristol v. Hungerford*, 2 Vern. 645. See, however, the report of that case, Prec. Ch. 81, and the note to *Rogers v. Rogers*, 3 P. Wms. 193, where it is stated, that the Court held, that the executors were trustees for the next of kin of the testator, but they happened also to be his co-heirs. This case, therefore, can be considered as of no authority either way. *Phillips v. Phillips*, 1 My. & Kee. 649, is, indeed, a *decision against the claims of the heir; but it must [*707] be considered as overruled by subsequent cases. See *Williams v. Williams*, Rolls, 13th Dec. 1835, L. J., Part V., N. S. 84; *Roberts v. Walker*, 1 Russ. & My. 752; *Henchman v. The Attorney-General*, 3 My. & Kee. 485; *Amphlett v. Parke*, 2 Russ. & My. 221; *Johnson v. Woods*, 2 Beav. 409; *Shallcross v. Wright*, 12 Beav. 505; *Gordon v. Atkinson*, 1 De Gex & S. 478; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. Governors of The London Hospital*, 10 Hare, 19.

And although a direction that the proceeds of real estate shall be deemed personalty be followed by an express declaration that it shall not lapse for the benefit of the heir-at-law, he will not be excluded from what the law in the absence of such declaration would give to him. Thus, in *Fitch v. Weber*, 6 Hare, 145, a testatrix devised and bequeathed her real and personal estate, in trust as to the real estate for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale, *as a fund of personal and not real estate; for which purpose she declared such proceeds, or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law*: and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should, by any codicil to that her will, direct or appoint. The testatrix made no codicil. Sir James Wigram, V. C., after an elaborate examination of the authorities, held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. "I feel myself called upon," observed his Honor, "to follow the course of decisions, in holding that the testatrix

has expressed an intention to exclude the heir *only for the purposes of her will*, and that, if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it." And see *Flint v. Warren*, 14 Sim. 554; 16 Sim. 124; *Bromley v. Wright*, 7 Hare, 334, 344; *Johnson v. Johnson*, 4 Beav. 318.

Mr. Cox, in a note to *Cruse v. Barley*, 3 P. Wms. 22, which has been highly commended by many eminent equity judges, states his opinion, that the several cases on this subject seem to depend upon this question—*whether the testator meant to give to the produce of the real estate the quality of personality to all intents, or only so far as respected the particular purposes of the will*: for that, unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personality *for the purposes of the will*, but further, that the produce of the real estate shall be taken as personality, whether such purposes take effect or not, so much of the *real estate, or the produce thereof, as is not effectually disposed of by the [*708] will at the time of the testator's death, (whether from the silence or inefficacy of the will itself, or from subsequent lapse,) will result to the heir. In the opinion of a learned writer, which seems to be fully warranted by the authorities, this statement of the doctrine, although correct as far as it goes, is not sufficiently explicit, and requires the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin:" 1 Jarman on Wills, 530, 2d ed.

Whether real property directed to be sold results to the heir as real or personal estate.—This question sometimes arises between the real and personal representatives of the heir. The following rules for deciding this question, may be laid down as the general result of the cases.

First, where it is necessary to sell the land for the purposes of the trust, and there is only a partial disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land, and will, therefore, go to his personal representative, even though the land may not have been sold during his lifetime; and, previous to the late Wills Act coming into operation, it would have passed by an unattested will as personality. See *Hewitt v. Wright*, 1 Bro. C. C. 86; *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Madd. 484; *Dixon v. Dawson*, 2 S. & S. 327; *Jessop v. Watson*, 1 My. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204.

Secondly, where a sale is unnecessary, by reason of a total failure of the purposes for which the conversion was directed, the heir will take the estate as realty, descendible to his heir, and devisable only by a will, attested so as to pass real estate: *Chitty v. Parker*, 2 Ves. jun. 271.

A sale unnecessarily made by trustees, will not vary the rights of the parties, as the proceeds will in that case be considered as the real estate of the heir: *Davenport v. Coltman*, 12 Sim. 610; and see *Cooke v. Dealey*, 22 Beav. 196.

This doctrine has been very clearly illustrated by Sir John Leach, M. R., in *Smith v. Claxton*, 4 Madd. 492. "Where a devisor," observes his Honor, "directs his lands to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale, for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, *and the heir stands [*709] in his place, the purpose of the devisor, that there shall be a sale, for the convenience of division, still applies to the case; and the heir will take the share of A. as A. would have taken it—as money, and not land. But in the case put, let it be supposed that A. and B. both died in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed; and the heir would, therefore, take the whole interest as land."

Money directed to be laid out in land.—The principle upon which *Ackroyd v. Smithson* was decided, applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail, as well as those which wholly fail to take effect; for the undisposed of interest in the money, or the estate, if purchased with the money, will result for the benefit of the next of kin of the testator, and will not go to the heir-at-law. The case of *Fletcher v. Chapman*, 3 Bro. P. C., Toml. ed., 1, and a dictum of Lord Redesdale's, in *Tregonwell v. Sydenham*, 3 Dow, 207, seemed to lay down a contrary doctrine. But Lord Cottenham, while Master of the Rolls, in the leading case of *Cogan v. Stevens*, 1 Beav. 482, n., reported more fully in the Appendix to Lewin on Trustees, p. 911, 3d ed., after examining all the authorities upon this subject, which are somewhat conflicting, put an end to the anomaly which previously was supposed to exist in the law of conversion, by deciding in favor of the claims of the next of kin. In *Cogan v. Stevens*, the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons, (all of whom died during the life of his widow, without issue,) in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, it was held by Lord Cottenham, that the next of kin, and not the heir-at-law of the testator was entitled to the fund. "The question," said his Lordship, "is simply, whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the [*710] lawful purposes, belongs to the next of kin, *or to the heir of the testator. . . . Upon principle, and upon analogy to several well established rules in equity, it would appear that there is no doubt as to the proper solution of this question. The only difficulty arises from some few cases, or

dicta of the judges, which it is impossible to reconcile with these principles or these rules; and some of the cases proceed from authority so high, that, if not absolutely binding on the Court, they ought at least to make it extremely cautious in pronouncing any judgment inconsistent with them. If a testator devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises lands for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will; and this whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that, if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal, or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but, if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? The proposition assumes the property in question, that is, a portion of the interest in the property, is not disposed of by the will, and the law gives to the next of kin all the personalty not disposed of. Is it from any incapacity in the next of kin to take property which exists in the form of land? That cannot be. . . . An observation was made by Mr. Pemberton, at the hearing, which removes much of the difficulty which would otherwise have arisen from the cases, namely, that no authority of an earlier date than *Ackroyd v. Simpson* ought to have much weight with me. The force of this observation will be felt on advert- ing to what Lord Thurlow says in deciding that case. He says, ‘I used to think, when it was necessary for any purpose of the testator’s disposition, to convert the land into money, that the undisposed land would be person- alty.’ Now this is precisely the argument used as to the conversion of money into land by Mr. Hodgson; and here I cannot but observe, that this subject of conversion has given rise to two of the ablest arguments ever addressed to any court—that by Lord Eldon, on the one side, in **Ackroyd v. Smithson*, and that by Mr. Hodgson, on the other, in [*711] the present case—an argument which has, since it has been delivered, been frequently mentioned at the bar in terms of the highest praise, and in which I gladly avail myself of this opportunity to express my entire concur- rence. In that argument it was necessarily admitted, if all the purposes of a devise [qu. bequest of money to be converted into land] failed, the whole be- longs to the heir-at-law, [qu. next of kin.] But it was contended, that if the purposes are to be in part executed, and so that the right to have such an investment of money in land effectually existed in any one, to answer such partial purpose, that the land so purchased, after answering such partial pur- pose, belongs to the heir. So thought Lord Thurlow, as to lands directed to be sold, before the argument in *Ackroyd v. Smithson*. No wonder, then,

that there should be found, before that time, traces of authority in favor of the heir's claim to money, as there was of the next of kin's claim to land ; but the exclusion of the latter is now too well settled to be disputed, and the argument for the heir rests on a supposed difference between the two. But no such difference was supposed to exist before *Ackroyd v. Smithson* : why then should it exist now ? If there be any substantial difference in principle let it prevail, but if in principle there be no distinction, is not the decision of *Ackroyd v. Smithson*, and the subsequent cases, of higher authority than any decision which may have taken place before the principle was so thoroughly discussed and established as it was in that case ? In deciding in favor of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time. . . . The result of the whole authorities seems to be, that, before *Ackroyd v. Smithson*, no distinction was recognized between the doctrine as applicable to a conversion of money into land, or land into money ; that, as to both, an opinion prevailed, that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd v. Smithson* ; but no case has occurred in which the point has been argued and determined as to money converted into land. I say argued and determined, because, if determined in *Leslie v. The Duke of Devonshire*, 2 Bro. C. C. 187, and *Fletcher v. Chapman*, 3 Bro. P. C., Toml. ed., 1, it certainly was not argued ; but there are [*712] undoubtedly dicta of very eminent judges, since that time, *which seem to show an impression on their mind, that the principle of *Ackroyd v. Smithson*, was not to be applied to a conversion of money into land. Those learned judges had not the benefit, which I have had, of hearing the point fully and most ably argued ; and having, after the fullest consideration, come to the conclusion that that principle does apply to the present case ; and, as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff ; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another."

The principles laid down in *Cogan v. Stevens*, have been acted upon by Lord Langdale, M. R., in the case of *Hereford v. Ravenhill*, 1 Beav. 481. There a testator gave his ready money, and money which should be due and owing to him, save as therein mentioned, to trustees, in trust, "as soon after his decease as a convenient purchase could be found," to invest it in the purchase of real estate, and to settle the same to the use of his wife for life, and after

her decease to the use of certain persons (who died during his life,) in fee, and, in the meantime, to lay the same out in the funds, and pay the dividends to the person to whom the rents of the premises to be purchased would for the time being belong; and the testator gave and bequeathed the residue of his goods, chattels, and personal estate to his wife absolutely. The widow having died, and the ultimate limitations to the remaindermen having failed by their deaths in the testator's lifetime, the question was, to whom the fund which then remained uninvested belonged. An objection was taken by the trustees, that the heir-at-law of the testator, who might be entitled to the fund as impressed with the nature of realty, was not before the court. Lord Langdale, M. R., upon the authority of *Cogan v. Stevens*, was of opinion that the heir-at-law was not a necessary party; because that case decided, that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which could take effect, entitled to the personalty as being impressed with the character of real estate.

**Distinction between a charge upon, and an exception from, a devise.*—It may not, perhaps, be out of place here, to notice the distinction [*713] that has been taken between the cases where property is devised, charged with the payment of a sum of money, and those cases where there is an exception from the devise. If the original destination of such sums has failed, by lapse or otherwise, the question then arises whether such sums result to the heir-at-law of the testator, or sink into the land for the benefit of the devisee.

It has been laid down by Sir John Leach, M. R., that "If a devise to a particular person or for a particular purpose, be intended by the testator to be an *exception* from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a *charge* only upon the estate devised, and not an *exception* from the gift, the devisee will be entitled to the benefit of the failure." *Cooke v. The Stationers' Company*, 3 My. & K. 264.

Thus, where land is devised *charged* with a sum of money which is given upon a contingency which does not happen, the heir will not be entitled to such sum by way of resulting trust, but it will sink into the land for the benefit of the devisee. For instance, where land is devised to A. charged with a legacy to B., provided B. attain the age of twenty-one, Lord Eldon, C., has observed, "There the devise is absolute as to A. unless B. attains the age of twenty-one; if he does, then he is to have the legacy; but his attaining twenty-one is a condition upon which alone he is to have it. And if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir-at-law does not come in, because the whole is absolutely given to the devisee." *Tregonwell v. Sydenham*, 3 Dow, 210; but see and consider *Attorney-General v. Milner*, 3 Atk. 112; *Croft v. Slee*, 4 Ves. 60. So in *Cooke v. The Stationers' Company*, 3 My. & K. 266, the testator gave and devised to his executors all his freehold and household estates in trust, that by sale of his personal property, and of so much of his real estates as might be necessary, they should raise a sufficient sum to purchase £10,700 in the £3 per cent. Consols, and he directed this sum of stock to be apportioned

between certain legatees, and, among other objects of his bounty, to charities, and he then gave to his wife the rest and residue of his estate and effects of whatever kind, on condition that all the legacies were paid. The charitable legacies failing so far as they affected the real estate, it was held by Sir John Leach, M. R., that as the charitable legacies were to be considered not as an exception from the gift to the testator's wife, but as a charge upon that gift, the wife was entitled to the benefit of the failure of the charitable legacies.

[*714] *In *Re Cooper's Trusts*, 4 De G. Mac. & G. 757, a freehold estate was devised to trustees and their heirs, upon trust within one year after the testator's decease, "to raise, by sale or otherwise," the sum of £2000, and to permit his son to enjoy the estate "after raising as aforesaid" for his life, with remainders over. Half of the £2000 was given for the benefit of a daughter of the testator for life, and after her death to her children. The daughter died without having had any children. It was held by the Lords Justices of the Court of Appeal, *dubitante* Turner, L. J., affirming the decision of Sir W. Page Wood, V. C., (23 L. J. (Ch.) 29, n.; 1 W. R. 231,) that the £2000 was a charge upon the devised estate, and not an exception out of the devise, and therefore, as to the £1000 given to the daughter and her children, upon her death sunk for the benefit of the devisee. "The law," said Lord Justice Knight Bruce, "is settled agreeably to reason and good sense, that where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by the will to a pecuniary charge in favor of other interests, and those other interests, given by the will, do not exhaust the entire property in the money, the charge, so far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge. That, I apprehend, no one will dispute. But it has been said that this is not such a case, because, in the first place, the real estate in question is given to trustees, in trust within a twelvemonth to raise, by sale or otherwise, £2000. A charge not directed to be paid out of income cannot well be raised but 'by sale or otherwise,' and these words mean no more than the law would attribute to a direction to raise the money by sale or mortgage, or to raise it simply. But reliance is placed upon the words 'after raising:' it was said that they mean something more than the expression 'subject to.' It is plain, however, in reason and principle, as well as authority, that the expression means no more than a gift of the estate subject to the charge. The testator gives this real estate in effect, subject to a charge of £2000, half of which is given for a purpose that has exhausted that half, and the other half for the benefit of a lady for life, and afterwards of her children. That lady is dead, and has never had a child. It is therefore plain that the devisee of the estate subject to the charge, is entitled to the benefit of the moiety of the £2000, the particular interest created by the will in that moiety having ended." See also *Jackson v. Hurlock*, Amb. 487; 2 Eden, 263; *Baker v. Hall*, 12 Ves. 497; *Ridgway v. Woodhouse*, 7 Beav. 437; *Noel v. Lord Henley*, 7 Price, 241; Dan. 211, 322; *Sutcliffe v. Cole*, 3 Drew. 135.

[*715] *Where a testator carves a chattel interest out of his real estate, and makes it the subject of limitations which fail, it will result to his

heir, but with the character which the testator has impressed upon it, viz., that of personal estate. Thus in *Burley v. Evelyn*, 16 Sim. 290, where a testator devised lands to trustees upon trust to sell, and retain £5000 out of the proceeds of the sale, and to stand possessed of that sum in trust for A. for life, and after his decease upon certain limitations which were void for remoteness, and he gave his personal estate, after payment of certain legacies, and the *residue of the money to arise by the sale of his real estates*, after making good the legacy of £5000, to B. A. died without having married, and the testator's heir also died. It was held, by Sir L. Shadwell, V. C., that the personal representative of the heir was entitled to the £5000.

Where a testator charges a sum of money upon a devised estate, and in consequence of the failure of the objects for which it was given the sum sinks for the benefit of the devisees, they will take it as real estate. Thus in *Re Cooper's Trust*, 4 De G. Mac. & G. 757, a testator devised a freehold estate, in such terms as made a sum of £2000 a *charge*, as distinguished from an exception, from the devise he afterwards made, and he devised the estate to his son Philip for life, with remainder in the events which happened to his sons Simeon and Thomas, as tenants in common in fee. The trusts declared of one half of the £2000 were for a daughter of the testator for her life, and, after her death, for her children. Simeon and Thomas died in the life of Philip, who kept down the interest of the sum of £2000. After the death of Philip the trustees raised the £2000, and subsequently the testator's daughter died without ever having had a child. It was held by the Court of Appeal in Chancery, affirming the decision of Sir W. Page Wood, V. C., (reported 23 L. J. N. S. (Ch.) 29, n.; 1 W. R. 231,) that the £1000 formed part of the real estate of Simeon and Thomas at their decease. "This point," observed Lord Justice Knight Bruce, "was raised,—it was said that as this sum might have been, and, as it was contended, ought to have been, raised in the lifetime of the devisees, Simeon and Thomas, it is to have been taken as having been so raised, and is therefore personalty in the devisees. Now, perhaps, a sufficient answer is afforded to this suggestion by the circumstance that, in point of fact, no sale or conversion did take place till after the deaths of the devisees, Simeon and Thomas, as to whom alone it is material to consider the question. But, although it is probable that this part of the case might be so disposed of, I am inclined to put it on much more general *ground. [*716] I am of opinion, making the supposition most beneficial to the appellants,—that is, supposing the money to have been raised by means of a sale during the lives of Philip and Simeon and Thomas,—that it was the right of any person interested in the estate (the title of the testator's daughter being removed out of the way,) to have it re-invested in real estate, to give it the actual character as well as the assumed character of realty. Therefore, if the daughter had died, leaving Philip, leaving Simeon, and leaving Thomas surviving, it would have become the right of Philip to insist (if he had chosen) that this money should be invested in real estate, which character had only been taken from it at the outset for a purpose that had partially failed of effect

or ended. In every possible view of the case, it appears that this must be treated as part of the devised real estate."

When a residuary devise or bequest comprehends property which would otherwise have resulted to the heir or next of kin.—In the cases we have before considered, the competition has been between the heir-at-law and the next of kin, where there has been a resulting trust for one of them; but whatever may result to either the heir-at-law or next of kin, may, by appropriate words, be given to others; for instance, if in the principal case the testator had directed that if any of the legacies should fail, by reason of lapse or otherwise, the same should be paid to a particular person, it is clear that he would be entitled to such of the legacies as failed by lapse or otherwise. Difficulties however have often arisen in determining, between the conflicting claims of the heir-at-law and the residuary legatee or devisee, whether that which has wholly or partially failed to take effect in favor of those for whom it was originally destined, was intended by the testator to be comprised in such an event, in a residuary bequest or devise.

First, with regard to that class of cases in which the competition has been between the heir-at-law and the *residuary legatee*; viz., when the question arises—whether the direction to convert realty into personalty is not so absolute as to pass the realty directed to be converted under a general residuary bequest of personalty. It seems, however, clear, upon the principles laid down in the cases before examined, that a mere direction to sell land for a particular purpose is not considered such an indication of a testator's intention to convert real into personal property to all intents, so that the undisposed-of proceeds should pass under a residuary bequest of personalty. Thus, in *Maugham v. Mason*, 1 V. & B. 410, a testator devised freehold chambers to trustees and [*717] their heirs, upon trust *to sell, and to apply the money arising by such sale towards payment of legacies, and the rents, until sold, to be applied to the same uses; and, after giving some pecuniary and specific legacies, as to the rest, residue, and remainder of his personal estate, after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust to convert all the said residue into ready money, and to lay out the same in the purchase of freehold property, to be settled as therein mentioned. The executors paid all the debts, funeral expenses, and legacies, out of the personal estate, not making sale of the real estate. Sir W. Grant, M. R., held, that the real estate, after payment of legacies, which were a primary charge upon the personalty, resulted to the heir-at-law, and did not pass under the residuary bequest. "The observation," said his Honor, "is perhaps minute, that the money, produced by the sale of the real estate, could not with propriety be spoken of as personal property to be converted into money; at most, however, this is a general bequest of the residue of his personal estate; and the question is, what was meant to be included under that description. Properly speaking, nothing is the personal estate of a testator that was not so at his death. He may certainly so express himself as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the money to a parti-

cular purpose, and a subsequent bequest of the rest and residue of the personal estate, I know of no case in which it has been held, that the surplus, after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary bequest. The mere disposition of the residue of personal estate can never solve the question, what is personal estate. The clause may be so conceived as to show the sense in which those words are used ; but here is nothing more than those words, unaccompanied with anything explanatory of the sense in which they were used." See, also, *Wilson v. Major*, 11 Ves. 205 ; *Berry v. Usher*, 11 Ves. 87 ; *Gibbs v. Rumsey*, 2 V. & B. 294 ; *Kellet v. Kellet*, 3 Dow, 248 ; *Dixon v. Dawson*, 2 S. & S. 327 ; *Collis v. Robins*, 1 De G. & Sm. 131.

Where, however, a testator expressly declares, that the money arising from the sale of real estate shall be considered as part of the personalty, it will pass under a general bequest of personalty in the same will : *Kidney v. Coussmaker*, 1 Ves. jun. 436 ; *Collins v. Wakeman*, 2 Ves. jun. 683 ; *Robinson v. The Governors of the London Hospital*, 10 Hare, 19, 27.

So, also, the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate, may be *inferred from [*718] expressions in the will irresistibly leading to such a conclusion ; and the blending of the real with the personal estate has been considered as furnishing an indication of such intention : *Byam v. Munton*, 1 Russ. & My. 503 ; *Mallabar v. Mallabar*, Cas. temp. Talb. 78 ; *Kellet v. Kellet*, 3 Dow, 248 ; *Brown v. Bigg*, 7 Ves. 280 ; *Griffiths v. Pruen*, 11 Sim. 202 ; *Bromley v. Wright*, 7 Hare, 334.

The next class of cases to be examined, is that in which the competition lies between the heir-at-law and the *residuary devisee*. And here it must be remembered, that although it has always been held that a will as to personalty speaks, at the *time of the death of the testator*, and the residuary legatee therefore takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intentions of the will ; yet, previous to 1 Vict. c. 26, it was otherwise as to the residuary devisee of real estate, or of the price of real estate. As to him, the will spoke only at the *time of making it*, and he could take nothing but what was at that time intended for him.

Thus, in a case previous to the Wills Act, where a sum was expressly excepted out of the produce of real estate devised to be sold, and was not disposed of, it is clear that it belonged to the heir-at-law, and not to the residuary devisee ; see *Collins v. Wakeman*, 2 Ves. jun. 683.

Upon the same principle, under the old law (although the authorities are somewhat conflicting) the better opinion seems to be, that where part of the produce arising from land devised to be sold, is directed to be applied to purposes which fail, either by lapse or on account of illegality, the heir-at-law, and not the residuary devisee of the produce, will be entitled to the benefit of the failure. Thus, in *Jones v. Mitchell*, 1 S. & S. 290, the testatrix by will gave £800 out of the money to be produced by the sale of her real estates, to trustees, for the benefit of certain charitable institutions ; and she gave the resi-

due of the money to J. R. The gift of the £800 being void, Sir J. Leach, V. C., held, that the heir of the testatrix, and not J. R., was entitled to it. "The deviser," said his Honor, "at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of the £800, and not the £800, which is therefore undisposed of, and results to the heir." See, also, *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Collins v. Wakeman*, 2 Ves. jun. 683; *Gibbs v. Rumsey*, 2 V. & B. 294; sed vide contra, *Page v. Leapingwell*, 18 Ves. 463; *Noel v. Lord Henley*, 7 Price, 240; S. C., 1 Dan. 211, 322.

[*719] The fact, however, of the testator *having blended the produce of his real with his personal estate, has in many cases been considered a sufficient reason to exclude the heir, in favor of the residuary legatee, of the produce of the real and personal estate, by applying to the mixed fund the rule applicable to personalty, such rule being, even under the old law, as laid down by Sir John Leach, in *Jones v. Mitchell*, 1 S. & S. 290, that the residuary legatee of personalty takes what is not effectually disposed of. See *Durour v. Motteux*, 1 Ves. 320; 1 S. & S. 292, n.; the dictum of Lord Thurlow in *Hutcheson v. Hammond*, 3 Bro. C. C. 148; *Kennel v. Abbot*, 4 Ves. 802; *Amphlett v. Parke*, 1 Sim. 275; 4 Russ. 75, per Sir John Leach; *Green v. Jackson*, 5 Russ. 35; S. C., 2 Russ. & My. 238; *Cooke v. The Stationers' Company*, 3 My. & K. 262.

The cases, however, of *Collins v. Wakeman*, 2 Ves. jun. 683; *Gibbs v. Rumsey*, 2 V. & B. 294, and *Amphlett v. Parke*, 2 Russ. & My. 221, (overruling the decision of Sir John Leach in that case,) decide that, although real and personal estate are blended together, a residuary devise or bequest of the proceeds to arise from the sale of the real and personal estate, will not carry to the residuary devisee or legatee of such proceeds, lapsed or void legacies, arising from the sale of the real estate, for such lapsed or void legacies, so far as they arise from the sale of the real estate, will result to the heir-at-law. In the case of *Amphlett v. Parke*, 2 Russ. & My. 221, a leading authority upon this subject, a testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale, to be considered and taken as part of her personal estate; she then directed, that, out of the moneys to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estates, upon trust for two persons, and their children. Some of the pecuniary legatees having died in the testatrix's lifetime, it was held by Lord Brougham, (reversing the decision of Sir John Leach,) that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir-at-law. Lord Brougham, in his learned judgment in this case, thus ably sums up the doctrine applicable to this class of cases: "The rule," observes his Lordship, "which I have stated to be extracted from all the cases, is, that you must clearly prove that the heir-at-law is excluded; that the words

prevent the possibility of considering anything to be left *as a resulting trust for him ; and that the burthen of such proof lies upon those [*720] who claim in opposition to him. It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him ; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause ;—if, he says, for instance, ‘I give all the lapsed legacies as parcel of my residue, to the residuary legatee,’ cadit quaestio there is no doubt he may ; and if he can do it by express words, he can do it by plain and obvious intention, to be gathered from the whole instrument. If you once arrive at the conclusion, that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention.” See, also, *Salt v. Chattaway*, 3 Beav. 576 ; *Taylor v. Taylor*, 3 De G., Mac. & G. 190.

As to wills coming within the operation of the new Wills Act, 1 Vict. c. 26, it must be remembered that the 25th section enacts, “that unless a contrary intention shall appear by the will, such real estate, or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail, or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise, (if any,) contained in such will.” See *Carter v. Haswell*, 3 Jur. N. S. 788.

The conversion of property, from one species to another, by the will of a testator, takes place, only for the purposes of the will ; and so far as those purposes do not extend, or, in so far as any of them do not take effect in fact or in law, the property is considered as remaining in its former condition, as it was in the hands of the testator, and passes accordingly. See *Smith v. M^cCrory*, 3 Fredell’s Equity, 204, 208 ; *The Commonwealth v. Martin’s Executors and Devisees*, 5 Munford, 117, 121 ; *Morrow v. Brenizer*, 2 Rawle, 185, 189 ; *Slocum v. Slocum*, 4 Edwards, Ch. 613.

Land directed to be converted into money.—If land is devised to trus-

tees to sell for the payment of debts and legacies, the heir-at-law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and he may come into equity and restrain the trustee from selling more than is necessary to pay the debts and legacies ; or, he may offer to pay them himself ; and pray to have a conveyance of the part of the land not sold in the former case, or the whole of it, in the latter, which property will, in either case, be land, and not money. “This right to call for a conveyance,” says Washington, J., “is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there

are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir-at-law, as the old use not disposed of." *Craig v. Leslie*, 3 Wheaton, 564, 582; *Burr v. Sim*, 1 Wharton, 252, 262; *Pratt v. Taliaferro*, 3 Leigh, 419, 423.

"The general rule," said Harper, C., in *North et al., Ex'ors, v. Valk et ux.*, Dudley's Equity, 212, 216, "is well known, that land, directed by the testator to be sold, shall be regarded in equity as personal estate; but this is to be taken subject to various qualifications. If the land is directed to be sold, as the cases express it, out and out, as if there were a general arbitrary direction to sell, without any specification of the object of the sale, or of the purpose to which the money was to be applied, this would be evidence of the intention to convert the land into money, in all events; but if it be directed to be sold for certain specific purposes, and the purposes altogether fail, as if it be for the payment of debts, and the testator afterwards pays off his debts in his lifetime, there the lands will go to the heir as real estate. Or if after accomplishing the specified purposes, a surplus of the fund should remain undisposed of, a trust in this subject, it is said, results for the heir. The doctrine will be better understood by re-

ferring to the cases. These are referred to, and the doctrine explained by Mr. Cox, in his note to *Cruse v. Barley*, 3 P. Wms. 22. It was admitted in the case, that where an estate is devised to be sold to pay debts, if there be a surplus it shall go to the testator's heir-at-law; forasmuch as when the debts are paid, the trust is satisfied, and the motive of the testator for the sale of the estate is at an end; and the heir, if he pleases, on laying down the money for the debts, may take the estate himself. There is a class of cases to this effect, when land is devised to be sold for the payment of debts and legacies; if pecuniary legacies be given, and the residue disposed of, there, if some of the pecuniary legatees die in the testator's lifetime, so that their legacies lapse, these shall sink into the residuum in favor of the residuary legatees, and not go to the heir-at-law. The testator is supposed to have intended to convert the real estate into personal, in favor of the residuary legatees, and against the heir-at-law. . .

" . . . Where the residue is disposed of, however, if one of several residuary legatees, who take as tenants in common, with no survivorship between them, dies in the lifetime of the testator, his lapsed share of the residue will go to the heir-at-law, so far as it is devised from the real estate. Such was the case of *Ackroyd v. Smithson*, (1 Bro. C. C. 503.) . . The subject is fully examined in the argument of Mr. Scott, who seems to have changed the opinion of Lord Thurlow.

"In this case the real and personal estate is directed to be sold, for the specific purpose of paying debts and legacies, and there is no disposition of

the residue. The personal estate is first applicable for this purpose. If it should prove sufficient, it follows that V. (a niece, a naturalized citizen,) as against G., (another niece, an alien,) will be entitled to the real estate. If it should be necessary to sell the real estate, or any part thereof, she will be entitled to any surplus that may remain after paying debts and legacies."

"It is a clear rule in equity," said the Court, in *Lindsay v. Pleasants*, 4 Iredell's Equity, 321, 323, "that, where real estate is directed to be converted into personal, for an *express* purpose, which fails, to consider the disappointed interest as realty, (although the land has been sold,) and resulting to the heir. The rule equally applies to cases, where the real proceeds are blended and bequeathed with the personalty, (after answering particular objects;) and the context of the will affords no manifestation of the testator's intention to convert the real into personal estate, *out and out*."

"Upon the principles of equitable conversion," said the chancellor, in *Wood v. Cone*, 7 Paige, 472, 476, "the proceeds of the real estate directed by the testator to be sold, is only considered as converted into personalty for the purposes of the will. And if any estate or interest in the converted fund was not legally and effectually disposed of by the will, there was a resulting trust, as to such estate or interest, in favor of the heir-at-law." See, also, *Wood v. Keys*, 8 Paige, 365, 369; *Arnold v. Gilbert*, 3 Sandford, 533, 556. And it may be regarded as well settled, that a direction to sell, for a particular object, or with a view to a contingent event, will not work a conversion, if the object cannot be ac-

complished, or the contingency does not happen, unless the testator plainly intended that the sale should be an end, and not merely a means; *Nagle's Appeal*, 1 Harris, 260-264. "A sale," said Bell, J., in delivering the opinion of the court in this case, "to effect some of a testator's objects, will not of necessity work a conversion of the whole subject of the sale, unless it be manifest such was the design of the testator, irrespective of ulterior chances. The result of the authorities, as stated by Mr. Cox, in his note to *Cruse v. Barley*, 3 P. Wms. 22, is, that the question of conversion, out and out, depends on whether the testator meant to give to the produce of real estate, the quality of personalty to all intents, or only so far as respected the particular purpose of the will; for, unless he has sufficiently declared his intention, not only that the realty shall be converted into personalty, for the purposes of the will, but further, that the proceeds shall be taken as personalty, whether such purpose take effect or not, the realty, or its produce may continue to be impressed with the character of land."

An instance, in which lands ordered to be sold, will be regarded as not converted, further than the range of the purpose for which the sale is ordered, extends, occurs, where a conversion of land into money is directed, with a view to a division of the proceeds among certain objects of the testator's bounty, and a question arises of the liability of different parts of the estate to the debts of the testator. In reference to liability for the debts, the land is considered as being land unconverted; for the considerations which proceed from that point of view, intercept and cut off the purpose for

which the conversion was ordered. In *Newby v. Skinner*, 1 Devereux & Battle's Equity, 488, lands were ordered to be sold and the proceeds divided among the testator's daughters, and specific legacies were given by the testator to his widow and son. A question of marshalling the assets arose between these parties; the latter contending that the proceeds of the sale of the lands ought to be regarded as in the nature of a pecuniary legacy, and therefore liable to abatement before the specific legacies, and the former insisting, that the said proceeds were in the nature of land specifically devised, and not liable for debts except upon a deficiency of the whole personal estate. "In our opinion," said Gaston, J., "the daughters have clearly the right in this controversy. The general rule is indisputable, that the personal estate is the first and natural fund for the payment of debts, and the real estate is not to be made liable thereto, except to supply the deficiency of the personal. It is sought, in this case, to subject the proceeds of the land devised to the daughters, because by the direction of the testator, to sell the land, he turned it, in the contemplation of a court of equity, into personalty, and made it a part of his general personal estate. This position, to the extent to which it is pressed, is untenable. The real estate directed to be sold, was at the time of the testator's death, land. By the will it was to remain land until sold, and it was directed to be sold only for the convenience of division between the devisees. It was impressed with the character of personalty so far as was necessary to effectuate the testator's purpose, but no further. Every person taking an interest under a will,

in the produce of land directed to be sold, is in truth a devisee, and not a legatee. As he takes from the bounty of the devisor, he must receive what is given, in the quality which the devisor has impressed upon it. The devisor has given, not the land, but the price of land; and though the trustee is not bound to sell, if the *cestui que trust* will take the land itself, yet the land in the hand of the *cestui que trust*, is, in equity, regarded as personalty; and if he die without any act to change its quality, it is personalty as between his heir and executor. The devisor might, if he pleased, (see *Kidney v. Cousmaker*, 1 Ves. Jr. 436, and 2 Id. 267,) have converted the land into money, out and out, and then from the whole context of the will, it would have been open for consideration, whether it was made an auxiliary fund for the payment of debts, or was thrown into the ordinary fund as a part thereof; or constituted the primary fund in exoneration of the personal estate. But even in these cases, the executors take as devisees; it is not strictly a part of the testator's personal estate, but real assets, applicable in their hands to the payment of debts, because devised to them in trust to be so applied. And in England, however it may be with us, the proceeds of land so converted, are held to be equitable, and not *legal* assets; *Barker v. May*, 9 B. & C. 489. But a conversion of land into money, directed for the benefit of devisees, creates no charge upon the land for the payment of debts, and does not make the proceeds either legal or equitable assets, in the hands of an executor. He holds these proceeds simply as a trustee, for the devisees; *Gibbs v. Angier*, 12 Ves. 413;

and see *Smith v. Claxton*, 4 Mad. 484."

Money directed to be laid out in land.—If money is ordered to be invested in lands to be settled in a particular manner, and the limitations directed, wholly or in part, cannot legally be executed, the fund continues to be personal estate of the testator, so far as the purposes of the conversion are not legal, and is to be distributed to the widow and next of kin as personalty; *Hawley v. James*, 5 Paige, 323, 486. "Although a court of equity," said the chancellor, in that case, p. 444, "considers money which the testator has directed to be invested in the purchase of land, and land which he has directed to be sold and turned into money, as of that species of property into which he has directed it to be converted, for all the valid purposes of the will, it is only considered in equity as if actually converted, so far as the objects for which the conversion was directed by the testator are legal, and can be carried into effect. But where the object of the conversion fails, either wholly or in part, whether such failure be occasioned by the incapacity of the devisee or legatee to take, or because of the illegality of the disposition attempted to be made of the converted property, or of any particular estate or interest in such property, or from any other cause, there will be a resulting use, or trust, or estate in the property, or in so much thereof as is not legally or effectually disposed of, in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will."

In order that the conversion which a testator has directed should be sustained, it is not necessary that such

conversion should have been intended to be made for all purposes whatever; if it is directed for any single purpose, and that purpose continues and operates, the conversion must take place. A sale of land ordered to be made for the convenience of dividing the proceeds among beneficiaries under the will, is an absolute conversion, so long as that object of division remains: see *Proctor v. Ferebee*, 1 Iredell's Equity, 143, 146; *Morrow v. Brenizer*, 2 Rawle, 185, 189. Nor will a conversion be arrested by the incapacity of some of the objects of the testator's bounty to take, after the conversion is made, provided the purposes for which the conversion was directed, subsists, as to some others of those objects. For example, if a sale of land be directed, for division of the fund among certain persons, and one of those persons dies in the testator's lifetime, so that his interest results to the heir-at-law, the sale must still take place, for the purpose of making the division, provided any of the distributees survive capable of taking, and the interest which results to the heir will be money and not land: if all the distributees die in the lifetime of the testator, so that the purpose of the conversion, a division among them, wholly fails, the conversion will not take place, and the interest resulting to the heir will be land and not money. See *Marsh v. Wheeler*, 2 Edwards, 157, 160, and *Bogert v. Hertell*, 4 Hill, 493, 495, 500. "The authorities demonstrate," said Nelson, Ch. J., in the Court of Errors, in the latter case, under a will devising lands to be sold for convenience of division, "that where the deviser has directed or authorized the conversion of his real estate, even for a particular special purpose, such as

distribution, courts are bound, so long as the purpose and object exist and continue, to regard it as of that species of property into which it was directed to be converted; and to the extent and for the purpose declared, it is to be treated as money and not land. This will be found to be the uniform language of all the cases on the subject. If the purpose and object of the conversion fail altogether, or in part, then the whole estate, in the one case, and the part, in the other, is regarded as an estate or interest undisposed of by the will; and as the deviser, in the event happening, has made no disposition of the estate, it takes the direction given to it by law, independently of the will, and goes to the heir-at-law. But in the latter case, where there is only a partial failure, if the purposes of the will still require a sale and conversion, the heir takes the part thus undisposed of, as money, and not as land, and, on his death, it will go to his personal representatives. . . . It may be considered as established beyond all controversy, that where the testator directs his lands to be sold for the purpose of division among his children and grand-children, so long as this purpose of the sale and conversion exists and is necessary to carry out the intent of the will, so long the quality of personalty is effectually stamped upon the estate in the hands of the executors; and courts are bound to consider it as subject to the laws of that species of property into which it was intended to be converted."

There seems to be an anomaly, however, in considering that the heir-at-law can ever take a fund as money. The heir-at-law is entitled only to

land: whatever he takes, is necessarily upon the ground of its being land; and it seems contradictory, that what he thus takes, should be taken as money. His title to have the fund rests upon its being land; in his ownership of it, after he has it, it is money. He claims it as one, and holds it as the other. Lord Eldon's amazing display of intellectual power in *Ackroyd v. Smithson*, was, to some extent, a triumph of argument over reason.

[The right of the heir-at-law results from the principle that the land being his, except in so far as the will discloses a different intention, he is *prima facie* entitled to so much of the proceeds as have not been disposed of or given away by the testator. But although the money goes, under these circumstances, to those who would have been entitled to the land, yet it goes to them as money, and will, consequently, be distributed as such among all who claim under them subsequently by descent or succession. Hence, while the surplus from a sale for the payment of debts will belong to the executor of the testator, and not to his heir, yet the right will vest, on the death of the latter, in his executors; and his heirs will take nothing in equity, even when he dies before the sale is made, and when the legal title consequently, descends to them at law; *ante*, 821. The rule was so held in *Grider v. M^c Clay*, 11 S. & R. 224; and *Pennell's Appeal*, 8 Harris, 515, with reference to the proceeds of a sale for the payment of debts by authority of law, and the principle would seem to be the same when the conversion takes place under and in pursuance of the directions of the testator.

"The general rule," said Lewis, J., in delivering the opinion of the court, "is that if land be sold for a specific purpose, the surplus money shall, as between the heirs and next of kin, be considered as land, so far as to vest in the persons who would have been entitled to it had it remained unconverted. But, after it has so vested in the person entitled, it is to be treated as money in his hands, and, in case of his subsequent death, goes to his personal representatives, as personal estate. It cannot retain its original character for ever. It has no earmark by which it can be distinguished from the other personal estate with which it is mingled. To identify and follow it throughout an indefinite number of successions would, in most cases, be absolutely impossible, and in all cases so inconvenient, as to forbid the undertaking, unless required by the high necessities of justice. But the distribution of the estate of a decedent among persons who never gave value for it, and who have no title to it whatever, except that which is founded upon the law and its policy, involves no principle of justice, and stands entirely uninfluenced by its dictates. The necessity of a perfect conversion, at some period, being apparent, and neither justice nor policy requiring that a *fiction* should be substituted for the *fact*, the proper time for it is when the money has vested in the party entitled to it, after the actual conversion."']

The doctrine of a resulting trust to the heir-at-law, upon the failure of the purpose for which a conversion is directed, proceeds upon the presumption that the testator intended a conversion for that purpose, only, and

meant that in case of its failure, the property should pass as if no conversion had been directed. If, therefore, the will discloses an intention that the property shall change its character, in all events, as well under the circumstances that arises upon the failure of some special purpose, as in the case of that purpose taking effect, there is no resulting trust to the heir. Even in "cases of resulting trusts, for the benefit of the heir-at-law," says Washington, J., "it is settled that if the intent of the testator appears to have been to stamp upon the proceeds devised to be sold, the quality of personality, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal." *Craig v. Leslie*, 3 Wheaton, 564, 583; *Morrow v. Brenizer*, 2 Rawle, 185, 189; *Burr v. Sim*, 1 Wharton, 252, 263; *Arnold v. Gilbert*, 5 Barbour's S. Ct. 192, 195. "The criteria which the authorities upon the subject of conversion furnish, are these," said the Assistant Vice-Chancellor, in *Wright and others v. Trustees of Meth. Episcopal Church*, Hoffman, 205, 219, "whether the will has prescribed a sale absolutely, and at all events—for all purposes, not merely for the purposes of the will—irrespective of all contingencies, and independent of all discretion. If the sale is to be made for a special purpose, or the general purposes of the will, and these purposes fail, conversion does not take effect; if it is to be made on a given event, it depends upon the occurrence of that event; if the disposition is left to the discretion of the grantee of the power, the will is not imperative, and

does not convert the estate. . . . Eldon's celebrated argument in that case, has been the settled test of every authority than that of *Ackroyd v. Smithson*, (1 Bro. C. C. 502.) Lord

DONATIO MORTIS CAUSA.

[*721]

*WARD v. TURNER.

JULY 20, 1752.

REPORTED 2 VES. 431.¹

DONATIO MORTIS CAUSA.]—*Delivery necessary to donations mortis causâ ; but the delivery of receipts for South Sea Annuities is not sufficient, though strong evidence of the intent.*

THE end of the bill was to have a transfer of £600 New South Sea Annuities made to the plaintiff, as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly, dead, intestate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to Mosely for services performed to Fly, against whose estate this demand was made.

The case the plaintiff made was this : he was executor of Mosely, who was related to Fly by affinity, having married his aunt ; that Fly had great obligations to Mosely, who took care of him in his infancy ; and at his house Fly used to come from school when it broke up : and, afterwards, Mosely, who, in the latter part of his life, appeared to be in very mean circumstances, lived with Fly as his servant, until Fly's death, had his victuals there, performed services to him, and had now and then a shilling given him. From thence Fly made profession of a strong intent to do for him at his death, and had great kindness for him ; in pursuance of which, as Fly drew near his end, being in a very bad state of health, during that time he made Mosely several donations mortis causâ, in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts, and declarations, supporting *them. First, 18th January, 1746, [*722] which was spoken to by the porter of Furnival's Inn. The second, 6th February, 1746, which was the principal proof relied on by the plaintiff to support the gifts of these annuities, and was proved by Fly's barber, who, being sent for by Fly, found Mosely with him, and no other, and swore to the particular words used, and declarations made : that Fly said to him, viz. : "I intended to give him, (speaking of Mosely,) Longford estate for his life ; but I have considered of it ; and that which is worth £40 a year to another, is not

¹ S. C., 1 Dick. 170.

worth so much to him; for if the tenants wanted an abatement for repairs, he would allow it; and, therefore, I will do better for him." That thereupon Fly went to his *escritoire*, and, taking three papers, said, "I give you, Mosely, these papers, which are receipts for South Sea Annuities, and will serve you after I am dead." The third, 23rd February, which was proved by one who swore, that in his presence Fly said, "Mosely, I give you all the goods and plate in this house." Fourthly, 3d March, by the said barber, who swore that Fly declared to him and to another person, who only were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books, and that this, together with those three receipts, would make £2000; that he wished a gentleman of his acquaintance had his sword and gun, but all the rest he gave to Mosely. He died in April following.

These were argued to be so many declarations of bounty, supported by so many witnesses at different times. Two questions arose: first, Whether, in fact, these things were given? secondly, Whether properly given in point of law? Donations *mortis causâ* are derived from the civil law. Justinian's Inst., lib. 2, tit. 7, shows the nature of them; and that, in general, anything is properly the subject-matter of such donations, that may be the subject-matter of a legacy or donation *inter vivos*. Either rights in possession or reversion are capable of being so given. *It is not necessary that the donor should have a legal interest; an equity will do, when by no act [723] he can pass the legal property; consequently, the formalities accompanying such donation must be according to the subject of the gift. Livery, then, cannot be always necessary, as, in a chose in action or simple contract debt, which lie not in livery, choses in action were not assignable, but now are in this Court as much as things in possession, by the rules of law; and, therefore, this Court will carry into execution a voluntary gift of a chose in action. In *Lawson v. Lawson*, 1 P. Wms. 441, such a gift of a note drawn on a goldsmith, which in point of law passed nothing, was held good: *Jones v. Selby*, Prec. Ch. 300; *Gold v. Rutland*, 1 Eq. Ca. Ab. 347. In *Snellgrove v. Baily*, March 11, 1744,¹ Mrs. Baily, going out of town in a bad state of health, gave her maid a bond, executed to her by a third person, saying, "If I die, it is yours." She died intestate; the plaintiff was her administrator; thus it stood in the defendant's answer. A bill being brought for discovery and delivery of the effects of the intestate in the hands of the defendant, the question was, whether the nature of the property was capable of being so given? His Lordship held, it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, the Court held it a good donation *mortis causâ*, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovery on it. That case rested singly on the averment in the answer; in this is strong evidence. The Court there put this

¹ 3 Atk. 214; Ridg. Ca. t. Hard. 202.

case: that, if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee for her use, the property would have been in the trustee, and the equitable interest in the cestui que trust, who, if she had given this chattel so circumstanced to the defendant, it would have been good. [*Lord Chancellor.*¹—That is a case put upon an equitable interest. There [*724] the chattel itself must *have been delivered.] Though these donations differ in some respects from testamentary dispositions, yet they participate in a great degree; for, like that, it is a declaration of his mind, what he will have done with his property when he is no more; he does not part with the property, or even the use of the thing, in his life; for that would prevent any such disposition from being ever made. Where the thing lies in livery, the livery is not made to complete, it is only evidence of the gift; and if, the moment after possession delivered, (with a declaration that he intended, if he died, it should be the donee's absolutely,) the thing was restored by the donee, that would not tend to defeat the gift. [*Lord Chancellor.*—I apprehend it would; and that such an instantaneous gift and taking back would not do, which it would be dangerous to admit.] But, where livery cannot be, the best evidence the nature of the transaction will admit of, being only to show the mind of the donor, will do. Here is such a delivery over, as is sufficient evidence of the gift of these annuities. They certainly lie not in livery, there being other ways of passing them. There is no evidence of them but one's name being placed in the book. The delivery, then, with strong words of gift of these receipts, which were the only symbol of his property, was as much as he could possibly do towards giving it, except a mere transfer in the books, which was not necessary, nor could he conveniently do that; and it was giving with a prospect of not recovering of that particular illness, for that of itself would be a revocation; but he died of it, and within two months of the gift. In cases of livery of seisin it is not necessary to deliver the thing itself, or any part; for, coming upon the land, and delivering a gold ring thereon, is enough, (1 Inst. 44,) though not participating of land; but there ought to be clear proof of the intent, which there is here. Next, as to the specific things, it is said, there was not sufficient possession delivered; but, in such a number of things, it is not necessary every one should be delivered. The subject of the [*725] gift is what was then in the house. If a *delivery is absolutely necessary, the plaintiff has not indeed proved it; but Mosely was actually in the house with him, and was then as much in possession as if actually delivered to him, which is not necessary if he is in possession. If one is recited to be in possession of a house, livery is not necessary. If one does as much as he can towards possession, it is all that is required; as delivery of the key of a warehouse; so of a piece of parchment, delivery of a ship and of the actual possession of it to the mortgagee, as determined by your Lordship in *Brown v. Williams*, (1 Atk. 160.) No more could be done here; for he could not carry the goods out of the house: and he was then in possession. However, as this is a bill for discovery of assets, if the plaintiff is not entitled to these gifts, he is at least to a reasonable satisfaction for his services.

¹ Hardwicke.

On the part of the defendant, administrator of Fly, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behavior of Mosely after the death of Fly, as not like one who thought he had a right to these donations from him : for it was sworn, that being at the house of Fly at his death, he continued there until midsummer ; he did not say these goods were his own, upon application made to buy them, but that they were Turner's, the administrator and next of kin ; sent to Turner desiring him to take them away ; that they were sent away, and Mosely assisted in packing them up, and declared he would not go into mourning, for that Fly had given him nothing that he could help. A donation mortis causâ, (though there is, indeed, such a thing in the law,) is of a very delicate nature, and, from its import, merely voluntary. [*Lord Chancellor*.—Such donations are subject to debts.] If there is no distinction between testamentary dispositions and such a donation, and there is a former will, the Statute of Frauds will be overturned, which relates to all wills of personal estate ; therefore, since the statute, no nuncupative will or codicil can be set up where a will was made before. The statute has expressed an anxiety *as to nuncupative wills, not taking them away absolutely for fear of breaking in upon [*726] the real intent, but, seeing them liable to uncertainty, litigation, and perjury, has put several restrictions on them ; whereas, if the said distinction is not observed, a nuncupative will may take place, proved at any time, and that by a single witness, where more than one would not be ventured, for fear of contradiction, and that at any distance of time, nor confined to £30, as the statute required. A testamentary disposition is a gift in case of, and only has operation after, death. A donation, then, cannot be in general in case of death, but must have something peculiar, differing from legacies. The characteristic of it is this : It is not on a general apprehension of approaching mortality, but where the particular recovery of the donor is annexed by way of defeasance to the gift, which would be otherwise absolute. It may be confined to an immediate illness ; but the Roman law puts the case of a man's going a journey, which was formerly more hazardous than now ; so, if going to battle, and in case he is killed, and makes that gift ; so, if under a bad state of health, he makes a complete gift, if he does not recover ; that must mean some circumscribed time or illness, and there must be some sort of defeasance, arising from the recovery or return home, to these donations, otherwise it is an absolute gift. But, though liable to be defeasanced, it must be a complete gift before inter vivos ; and that is the reason the Ecclesiastical Court has no probate or jurisdiction over it, as it would if testamentary. Next, to consider what is meant by delivery, in the Roman and civil law books, as far as admitted in this country ; for, as it is in all the books, it will not hold here. Where delivery is necessary to make that complete inter vivos, if a man said, "I give it," and there is no delivery, it would be nudum pactum : there could be no title or action. Then delivery is there put only to show that the gift must be complete. In that new species of property the actual delivery is supplied by that which is equivalent to delivery ; as in case of a ship, delivered by bill of sale,

which is defeasanced in case of *recovery; that is enough; but it must [*727] be complete according to the nature of the thing, otherwise it cannot be distinguished from a legacy. A delivery is necessary, according to Swinburne, in each of three instances he puts, of a donation mortis causâ. *Lawson v. Lawson*,¹ turned upon it, and could not be admitted but on that foundation. There cannot, indeed, be such a donation by parol, of a book or simple contract debt, or of arrears of rent, because there can be no delivery, and no inconvenience, because it may be easily done another way. Taking it in case of a specific thing, as a horse, &c., possession is altered, (as Swinburne supposes,) and then the donee shall enjoy it; otherwise there is no difference between this and a testamentary disposition. This donation, therefore, takes effect; but still liable to that contingency. There is no case that the donor must keep possession in his life; how, then, can he have the use or benefit of it, taking it to be a specific thing? As to a chose in action being allowed to be given, that was a new case before your Lordship; for *Snellgrove v. Bailey*,² which was of a bond, was the first ever determined upon anything of a chose in action. The reason the Court went on there was, that it was as complete a gift as could be made of a bond; for, writing not being necessary to the assignment of a bond, if all was delivered that could be, all that was required was done. It was a substantial gift of the paper and seal, without which there could be no recovery on it. A bond carries the debt itself, not only evidence or security of it, therefore is considered as bona notabilia, and not only where the party dies, like other choses in action; and a court of equity does not say, a bond must be delivered by deed in writing. In *Richards v. Symes*,³ on a gift of a mortgage to the mortgagor, by giving him the deeds, your Lordship held, that if that fact was proved, it was a gift of all the money on the securities, and not within the Statute of Frauds. So that the bond there is as completely given as can be, supposing that parol evidence is sufficient, and writing not necessary. If that was not the ground of that determination, *and [*728] no delivery requisite, but that it is to remain with the donor until his death, and only a formal delivery, it will not differ from the inconveniences intended to be guarded against by the Statute of Frauds; for then every loose declaration will be set up, notwithstanding solemn wills before executed. It is dangerous to support parol declarations upon gifts of this kind, not accompanied with a visible act to give notice to all the world, as delivery. And the statute has thought it better, that some of these true gifts should fail, (as has frequently happened for want of the solemnities thereby required,) than there should be a public inconvenience. If a common chose in action cannot be delivered, how can this, which is stronger, as it is capable of being assigned by a proper transfer? If, indeed, one goes as far as he can, the Court will perhaps supply it; as in those cases on the stat. Jac. 1, in *Ryall v. Rowles*,⁴ but that is not the case here. Fly was a man of business, an attorney, yet waits near two months without doing that which would effectuate it. That argument of the testator's having time to make a perfect gift, is often used in

¹ 1 P. Wms. 441.² 3 Atk. 214.³ Barnard. Ch. Rep. 90.⁴ 1 Ves. 348.

Doctors' Commons on imperfect wills. This Court will never support that as a donation, which may be a gift by will; for there must be a difference between them.

Lord Chancellor Hardwicke, in the outset, laid the other goods out of the case, of which there was no pretence of any delivery, which would be very dangerous; and that it was impossible to make such a complex donation mortis causâ, as a general bequest of all one's personal estate, or of a residue, without some proof of delivery; for that would be the same as a nuncupative will; and it was a pity the Statute of Frauds did not set aside all these kinds of gifts. But what weighed with him was, whether the stock without delivery was a good donation mortis causâ; which question, considering the vast proportion of property in such funds, was of infinitely greater consequence than the value of it; therefore he should not determine it hastily. If courts of justice were compellable by rules of law to suffer such gifts, *without any transfer, to prevail, it could not be helped; but then the Statute of Frauds [*729] relative to nuncupative wills would be so far nugatory and vain.

Having taken time to consider, his Lordship now delivered his opinion.

LORD CHANCELLOR HARDWICKE.—There are two general questions. What is the weight and strength of the evidence in point of fact? Next, the result of that evidence in point of law, or the law arising on this fact?

As to the first, and as to the conviction arising therefrom, there is, to be sure, very strong evidence on the part of the plaintiff, of Fly's general intention of bounty, which is not to be disputed; but as to evidence of the particular gifts, I cannot help taking notice, that the declarations relied on by the plaintiff to prove them, are all made to persons of extreme low degree, his porter, barber, &c. It is observable, also, that Fly was bred an attorney; had some property, some real estate; was a man of business; and must be presumed from his profession and education, to know something of what the law required to make a will; and certainly it would be more easy for him to have made a will in writing, than to have taken all these several steps, to give away these parts of his estate. It is likewise observable, that the behavior of Mosely, and his declarations after the death of Fly, are some impeachment and weakening of the plaintiff's evidence; for it is extraordinary, that, if he thought himself entitled, he should not insist upon these goods being his own, instead of suffering them to be taken away, and assisting therein. At the same time, if I was to ground my opinion upon any objection to the evidence in point of fact, I should not determine it, but send it to be tried; for this is as proper a case to be tried as any other.

It is not insisted upon by the plaintiff as a testamentary cause; for if he was to insist on that, it would overturn his demand, as he has no probate; but it is insisted on as a donation mortis causâ. Trover might be brought for it; *for it would transfer the property: but though I have searched for it, I do not find a case of that kind in the books, of such an action at [*730] law; but it might be tried at law, was there a foundation for it; and if I was

to ground my opinion upon the evidence in point of fact, I would direct a trial.

But, according to my opinion, there is no reason to give the parties that trouble; for next, supposing the fact well proved, the consideration is the result in point of law.

The relief sought, is founded upon these gifts being good donations mortis causâ.

First, as to any specific parts (if they may be so called,) except the annuities. They are clearly not good, (as I declared at the hearing,) there being no pretence of any delivery in any shape whatever. They are so general, as, in my opinion, if they prove anything, to prove an intent to make a nuncupative will of all his personal estate, (this is exclusive of annuities,) saying, "Mosely, I give you all the plate and goods in this house," or, "If I die, all are yours;" but nothing was delivered. It is said, he had possession by living in the house, and did not want delivery, but he lived as a servant, who had no possession; so that, if a servant had them in custody, it would be a possession for his master. The other declarations are not only of the goods, but of all money and arrears of rent, and extend almost to everything; consequently, there is no grounds to carry it so far; and it is impossible to support any of these as gifts in prospect of death, as I have declared already.

Next, as to the gift of this annuity. If the witnesses deserve credit, it is strong evidence of a general intent of bounty; but it rather turns against the plaintiff, for it shows a general intent to give the whole to Mosely, by making a nuncupative will or wills at different times. If that was to be admitted to support these several gifts as so many donations mortis causâ, it would overturn not only the letter but the whole spirit and intent of the Statute of [*731] Frauds. But, notwithstanding, suppose this *gift of the annuities was just, as if it was a distinct and independent donation from the other matters insisted on as gifts, the question is, whether it is such a gift as the law of England allows, as a donation mortis causâ? First, The fact of the gift is proved only by one witness; whereas the civil law, from which this doctrine is taken, requires five witnesses thereto; for Justinian, when he allowed these gifts, was apprehensive of fraud arising from them, and takes notice in that very chapter relied on for the plaintiff, that he had made a constitution to regulate it, that it should be in the presence of five, limited in point of value, &c., which shows how jealous he was of it. Besides, the witness swears to this in very formal words; and, though it is pretty hard to object to a witness as loose and uncertain on one hand, and the contrary on the other, yet this argues either a very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. That is the form of the gift. Taking it, therefore, according to the substance of the gift, that this amounted to a declaration, that Fly, by giving these receipts, intended to give the annuities, upon this the principal point arises, whether delivery of the thing given by way of donation mortis causâ is necessary; and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation mortis causâ? I am of opinion,

that delivery is necessary to make good such a gift, and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation mortis causâ, according to the civil and Roman law, and the law of England.

According to the civil and Roman law there is great variety, and several passages therein are pretty difficult to reconcile. Digest, lib. 39, tit. 6, Law 38, requires that both donor and donee should be present at the time of the gift, "*quo præsens præsenti dat;*" which looks as if delivery was intended at the time. It is "*quo*" there, and in several editions; but in the Lyons edition of Gothofredus' **Corpus*, it is "*quod;*" which makes it sense. Next, in Digest, same tit. parag. 1, it speaks of it throughout as a [*732] restoring of the same thing, if the donor should recover; as if a restitution was to be. It is proper to take notice, that in the Roman law there were *three* kinds of donations mortis causâ. And in Voet on the Pandect, lib. 39, tit. 6, parag. 3, in his 2nd vol., p. 710, the division is agreeable to that made of these donations by Swinbourne. The first is a donation by one in no present danger, but in consideration of mortality if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is, where the property passed at the time, defeasible in case of an escape from that danger in view, or of recovery from that illness. The third was, where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put it in possession of the person as an inchoate gift, to take effect in case he should die. Vinus's Comment. on this place of Justinian is more particular—puts the remedy by action the donor might have, in case he repented or revoked. That is, on the last kind of donation mortis causâ, where he did not part with the property immediately, he should have a real action; but where he actually parted with the property, but the gift was to be defeated by his revocation or recovery, or escape from that danger he was in, *conditionem habeat*, (which is a personal action,) to make the irritancy, or to recover damages for the thing; so that it differed not but in the nature of the action. And in Calvin's Lexicon, &c., that is the distinction. Swinburne, on the text I have quoted implies there should be a delivery; saying, that legacies differ from such donations, for, that legacies are not delivered by the testator, but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But, notwithstanding this, several books in the civil law import the contrary; particularly Vinus, in his Comment., lib. 2, tit. 7, sec. 1, numero 2; Covarruvias, vol. 1, rub. 3, and [*733] *Voet on the Pandect, same chapter, num. 3 and num. 6, which passages show the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction, reconciling them all, according to what is laid down by Voet, num. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned; but, in the other case, where the property was to pass immediately, it was required; which is the meaning of the expression

in Voet, "in mortis causâ donatione dominium non transit sine traditione," and of that other expression in Voet. With this distinction, those passages in the civil law are properly reconciled.

Though I know these donations mortis causâ could never come directly in question in the Ecclesiastical Court, they might collaterally; and, on these two heads I inquired whether there have been any cases there upon this, viz., in suits against an administrator on account of assets by the next of kin, where the administrator had insisted he had, he could not administer such a part, because it was given mortis causâ; or, if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation mortis causâ, there it might come in question in the Ecclesiastical Court; but I cannot find it has. The nearest case to it is *Ousley v. Carrol*,¹ June, 1722, in the Prerogative Court, before Dr. Bettesworth. There was left a writing in the presence of three witnesses, not in the form of a will, but a deed, viz.: "I have given and granted, and give and grant, to my five sisters, and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife, and who had been so, but divorced, who insisted this was no will, but deed of gift mortis causâ, (and a gift mortis causâ may be made in writing as well as otherwise, and so it might by the *Roman and civil law;) but the Ecclesiastical Judge was of [*734] an opinion this was testamentary, proved it as such, as a testamentary act, and probate was granted, from which there was no appeal; but a case was there cited of *Shargold v. Shargold*, upon a deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered, by way of symbol, to put the grantee in possession; that was pronounced for as a will, not as a donation mortis causâ; which I mention to show how far the Ecclesiastical Court has considered these things as testamentary.

Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will consider it according to the law of England. They are undoubtedly taken from the civil law; but not to be allowed of here farther than the civil law on that head has been received and allowed. Taking the law of England to consist, (as Hob. says,) of rules of law and equity, it might have come in question in cases of action of trover and detinue; but I have never found any action on that head. Consider it, therefore, as in this Court, the civil law not binding here, but as far as received and allowed; which must be from adjudged cases and authorities, proving that the civil law has been received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls tradition, for which, Swinburne, who, being an English writer on the civil law, what he lays down is some evidence of what has been received here, Part I., sec. 7; but, in other places, sec. 6, in tit. Definition of Legacy, he is

¹ See *Thorold v. Thorold*, 1 Phillim. 1; *Attorney-General v. Jones*, 3 Price, 368.

still more express. In both places, in one directly, in the other collaterally, he lays down, that delivery is necessary.

Next, consider it on the resolutions of this Court; the same thing results from them. There are not many cases on this head, and they are somewhat loose. The first is *Drury v. Smith*, 1 P. Wms. 404, where Lord Cowper founded himself on this, and the possession transmitted and changed; next *Lawson v. Lawson*, 1 P. Wms. 441. All that I can collect from thence is, that the [gift of the] *purse was held good, because delivered to the wife herself. As to the other legacy of £100 bill, I cannot say on [*735] what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it, that nothing can be inferred from it; but, being a draught on his goldsmith, that draught was delivered; so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones v. Selby*, Prec. Ch. 300, the result is, that the opinion of the Master of the Rolls was founded plainly on this, of the delivery of possession; holding, that the gift of the tally, as contained in the hair trunk, was a good donation mortis causâ; and that Lord Cowper avoided determining that, on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances, it is absolutely necessary to be the person's after the party's death; though, in some cases, it vests the property, in others not. But, to explain more fully Lord Cowper's opinion there, I will refer you back to *Drury v. Smith*, and to *Hedges v. Hedges*, Prec. Ch. 269, which turned on another point; but there Lord Cowper laid down a necessity of delivery very strongly; where he says, testator "gives with his own hands." *Snellgrove v. Baily*,¹ determined by me, 11th March, 1744, was urged, where a bond was given in prospect of death; the manner of gift was admitted; the bond was delivered; and I held it a good donation mortis causâ. It was argued, that there was no want of actual delivery there, or possession, the bond being but a chose in action; and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go further, and I choose to stop there. But I am of opinion that decree was right, and differs from this case; for, though it is true that a bond, which is specialty, is a chose in action, and its principal value consists in the thing *in action*, yet some property is conveyed by the delivery; for the property is vested, and to this degree, that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it *puts it in his power to destroy the obligee's power [*736] of bringing an action, because no one can bring an action on a bond without a profert in curiam.² Another thing made it amount to a delivery, that the law allows it a locality; and, therefore, a bond is bona notabilia, so as to require a prerogative administration, where a bond is in one diocese and goods in another. Not that this is conclusive; this reasoning I have gone

¹ 3 Atk. 214.

² An action may, however, now be brought without profert. See *Duffield v. Elwes*, 1 Bligh. N. S. 543.

upon, is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation mortis causâ; for if to a donation inter vivos, I doubt he went too far.

Another case is *Miller v. Miller*, 3 P. Wms. 356; which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree; but there is a great difference between delivery of a bond, (which is a specialty, is itself the foundation of the action, and the destruction of which destroys the demand,) and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore, from the authority of Swinburne, and all these cases, the consequence is, that by the civil law, as received and allowed in England, and consequently by the law of England, *tradition or delivery is necessary to make a good donation mortis causâ*; which brings it to the question, whether delivery of the three receipts was a sufficient delivery of the thing given, to effectuate the gift. I am of opinion it was not.

It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of symbol is sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this Court, delivery of the thing given is relied on, and not in the name of the thing, as [*737] in the delivery of sixpence, in **Shargold v. Shargold*; if it was allowed any effect, that would have been a gift mortis causâ, not as a will, but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to have been held good, is *Jones v. Selby*; but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, as *Ryall v. Rowles*,¹ and others. It never was imagined, on that statute, that delivery of a mere symbol in the name of the thing, would be sufficient to take it out of that statute; yet, notwithstanding, delivery of the key of bulky goods, where wines, &c. are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive; but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no color for it; it is no evidence of the thing, or part of the title to it; for suppose it had been in a mortgage in question, and

a separate réceipt had been taken for the mortgage money, not on the back of the deed, (which was a very common way formerly, and is frequently seen in the evidence of ancient titles,) and the mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage, *mortis causâ*, by force of that act. Nor does it appear to me, by proof, that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death; for there is a witness who speaks, that, *in [*738] some short time before his death, Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous to allow this donation *mortis causâ*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action; because stocks and annuities are capable of a transfer of the legal property by act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. To this purpose, consider the clauses in the Statute of Frauds¹ relating to this; which seem to me to be applied directly to prevent a mischief of this sort. The clauses are in sections 19, 20, 21, 22,² which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of the testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next, comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is, then, a revocation of a will by words only; viz.: "This is yours when I die;" all these clauses, therefore, will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make *a donation *mortis causâ*, [*739] of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot, without a transfer, or something amounting to that: and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists

¹ 29 Car. 2, c. 3.

² These sections are repealed by 1 Vict. c. 26, s. 2; but as to the wills of soldiers on service, or mariners, and as to the wills of petty officers, seamen, non-commissioned officers of marines, and marines, so far as relates to money arising from service, see ss. 11 & 12, and 11 Geo. 4, and 1 Will. 4, c. 20.

now in stock and funds; and all the anxious provisions of the Statute of Frauds will signify nothing, if donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add, (what I very seldom do, though it has been done by my predecessors,) that I should be very glad to have this point settled by the supreme authority; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

The bill ought to be dismissed therefore, without costs, as to the demand of these annuities, or any other part of the intestate's estate by way of donation mortis causâ.

But as there was a plain intent of bounty and kindness to this old man, who lived with him as a servant, and it seems, in expectation of what should be given at his death, therefore, on the other part of the bill an inquiry should be, what Mosely deserved over and above his maintenance, for services performed during the life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pay it.

In *Ward v. Turner*, which is a leading case on the doctrine of donations mortis causâ, Lord Hardwicke, with great learning, discusses the authorities [*740] upon the civil law, from which it has been *imported into the law of England. See *Dudfield v. Elwes*, 1 Bligh, N. S. 536; 1 Dow & C. 10.

In the subsequent case of *Tate v. Hilbert*, 2 Ves. jun. 111, *Ward v. Turner* was commented on, and the civil law more fully explained, by Lord Rosslyn, in his very able judgment. "All the passages in Swinburne," said his Lordship, "are only references to different texts of the civil law; and where he defines *donatio mortis causâ* he is coupling the description of a legacy with a very short text of the civil law; there is a perplexity in it. He takes it from a part of the civil law compiled at a time when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy. . . . The two first species of which he makes mention, are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations, and rates them all under the general title, *Donatio mortis causâ*."

"That is the time when it was in dispute. 'Julianus, libro 17 Digestorum, tres esse species mortis causâ donationum ait; unam, cum quis nullo præsentis periculi metu conterritus, sed solâ cogitatione mortalitatis, donat. Aliam esse speciem mortis causâ donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis

periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.'

"If he had looked a little further under the same title, he would have found there an opposite, but a much more correct opinion, which finally prevailed, and was established as legal. It is the twenty-seventh law: 'Ubi ita donatur mortis causâ, ut nullo casu revocetur, *'mors'* (that must be supplied,) causa donandi magis est, quam mortis causâ donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causâ donatione.' In the Institutions, in the time of Justinian, tit. 7, De Donationibus, there is a history given of these contests that had prevailed; and a definition is strictly given of what shall be donatio mortis causâ. 'Mortis causâ donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is qui accepit, sin autem supervixisset, is, qui donavit, reciperet; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere *oporteret, et utriusque causæ quædam habebat insignia [*741] et alii ad aliud genus eam retrahebant; a nobis constitutum est; ut per omnia fere legatis connumeretur, et sic procedat quemadmodum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, cum magis se quis velit habere quàm eum, cui donat, magisque eum cui donat quàm hæredem suum:.' Just. Inst., tit. 7, De Donationibus. There it is clearly and correctly defined, that it had in effect the nature of a legacy, and was liable to debts, and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned, at the same time, with the passage I have read, an ordinance of the emperor, that it should be in writing, with five witnesses. In the case before Lord Hardwicke, (*Ward v. Turner*), in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that, by the law of England, it cannot be a present, absolute gift, but to take effect on the death of the party."—Per Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 118; and see *Staniland v. Willott*, 3 Mac. & G. 674.

The following circumstances are requisite in order to constitute a good donatio mortis causâ:

1. The gift must be made by the donor in contemplation of the conceived approach of death: (*Duffield v. Elwes*, 1 Bligh. N. S. 530; *Edwards v. Jones*, 1 My. & Cr. 233, 236; otherwise it will not be a good donatio mortis causa: (*Hedges v. Hedges*, Prec. Ch. 269; *Walter v. Hodge*, 2 Swanst. 92, 100;) but a gift will be presumed to be in contemplation of death, where the donor is "in his last sickness," or "languishing on his death-bed:." *Miller v. Miller*, 3 P. Wms. 356; *Lawson v. Lawson*, 1 P. Wms. 441; *Walter v. Hodge*, 2 Swanst. 100; but see the dictum of Chief Baron Eyre in *Blount v. Burrow*, 1 Ves. jun. 546.

2. The gift must be intended to take complete effect only after the donor's decease: *Edwards v. Jones*, 1 My. & Cr. 233; *Tate v. Hilbert*, 2 Ves. jun.

120. But it is not absolutely necessary that the donor should expressly declare that the gift is to be returned to him if he recover, for if it be made in the extremity of sickness, or in contemplation of death, the law implies a condition, that it is to be held only by the donee in the event of the donor's death. Thus, in *Gardner v. Parker*, 3 Madd. 184, A. being seriously ill, two days before his death, in the presence of a servant, gave B. a bond, saying at the same time, "There, take that, and keep it." Sir John Leach, V. C., held the gift to be a donatio mortis causâ. "The doubt," said his Honor, "here is, [*742] that the donor has not expressed that the bond was to be *returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift, only in case of his death. If a gift is made in expectation of death, there is an implied condition, that it is to be held only in the event of death. The cases of *Lawson v. Lawson*, (1 P. Wms. 441;) *Miller v. Miller*, (3 P. Wms. 358;) *Jones v. Selby*, (Prec. Ch. 300,) furnish this rule." And see *Tate v. Leithead*, Kay, 658, 662.

If, however, it appear, from the circumstances of the transaction, that the donor intended to make an immediate and irrevocable gift, it will not be a good donatio mortis causâ. Thus, in *Edwards v. Jones*, 1 My. & Cr. 226, M. C., the obligee of a bond, five days before her death signed an endorsement, not under seal, upon the bond, as follows: "I, M. C., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon." It was argued, that if the gift could not, in consequence of its being incomplete, take effect as a donatio inter vivos, it would take effect as a donatio mortis causâ. But Lord Cottenham held, that it could not take effect as a donatio mortis causâ, as an absolute and irrevocable gift was intended. "A party," observed his Lordship, "making a donatio mortis causâ, does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift, that it shall not otherwise take effect. A donatio mortis causâ leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment, by which the donor, M. C., transfers all her right, title, and interest in the subject, to her niece; and that is really the whole evidence of the transaction; for the testimony of several persons, who were present, proves that it was intended as a gift; and though others speak as to an intention being expressed, inconsistent with the written document, very little attention can be paid to statements of what passed, when contradicted by the act of the party, as evidenced by a written instrument. . . . There is not very precise evidence as to the time when these bonds got into the possession of the plaintiff. There is also a defect of evidence, to show that at the time at which the transaction took place, M. C. was in such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event. These considerations, however, do not appear to be very material, *because I consider

the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causâ*.”

Upon the same principle the gift of a check upon a banker is not good as a *donatio mortis causâ*, because it is a gift which can only be made effectual by obtaining payment of it in the donor's lifetime, and is revoked by his death. See *Tate v. Hilbert*, 2 Ves. jun. 111.

Although there be an actual legal transfer of property such as standing by itself alone, would amount to a complete gift *inter vivos*, it will nevertheless be a *donatio mortis causâ*, if there be annexed to the gift a condition either express or implied that it is only to take effect in the event of the death of the giver, and upon his recovery the donee will be a mere trustee, (*Staniland v. Willott*, 3 Mac. & G. 664,) unless there be a confirmation of the gift, so as to convert it into, or give it the effect of, an absolute irrevocable gift *inter vivos*, (*Ib.* 681.)

3. There must be a delivery or traditio of the subject of the gift to the donee for his own use : (*Tate v. Hilbert*, 2 Ves. jun. 120 ;) or upon trust for another person : (*Drury v. Smith*, 1 P. Wms. 405 ; *Farquharson v. Cave*, 2 Coll. 367 ; *Moore v. Darton*, 4 De G. & Sm. 517 ; and see *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n. ;) or for a particular purpose ; see *Blount v. Burrow*, 4 Bro. C. C. 71, where the donor, twelve days before his death, delivered to the donee four India bonds to enable him to carry on and maintain a law-suit, which the donor had commenced. Lord Commissioner Eyre held it to be a good *donatio mortis causâ*, but he directed an issue to try whether the bonds were delivered.

It was, indeed, argued in *Hambrooke v. Simmons*, 4 Russ. 25, that a *donatio mortis causâ* could not be coupled with a condition, or made subject to a trust ; but as an issue was directed which left the question of law, as well as of fact, to the consideration of a court of law, the point was not decided. However, in the subsequent case of *Hills v. Hills*, 8 M. & W. 401, where a person on her death-bed, gave a pocket-book, containing £80 in cash and notes to her brother, wishing that he should bury her, and that he should have all she had, it was held, in the Exchequer, by Abinger, C. B., Parke, B., Alderson, B., and Rolfe, B., that it was a good *donatio mortis causâ*, although coupled with a trust. “I cannot see,” said Mr. Baron Rolfe, “how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference, that with it he is to pay for a particular thing. If a man on his death-bed gives another £1000, is it any addition to the evils attending this mode of bestowing *property, that he attaches a condition to it ; [*744] as, for instance, that he stipulates, that his brother shall receive an outfit to India? The case of *Blount v. Burrow*, is expressly in point, and disposes of the question ; and I have no doubt that other cases might be found.”

These decisions rightly follow the civil law, according to which it is clear, that a *donatio mortis causâ* might be made the subject of a trust or condition. “*Eorum quibus mortis causâ donatum est, fidei committi quoquo tempore po-*

test; quod fidei commissum, hæredes, Salva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fideicommisso teneatur, fideicommissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majore pecuniâ præstari non dubiè voluit integra." Dig. lib. 31, tit. 1, l. 77, s. 1, cited 4 Russ. 27; 2 Coll. 356. "Ab eo, qui neque legatum neque fideicommissum, neque hæreditatem vel mortis causa donationem accepit nihil per fideicommissum relinqui potest." Cod. lib. 6, tit. 42, l. 9, cited 4 Russ. 27. Sed vide *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n.

A delivery in order to be effectual must be made either to the donee himself or to some one for him. A mere delivery to an agent, in the character of agent for the giver will not be sufficient. (*Farquharson v. Cave*, 2 Coll. 356, 367;) the delivery also when there are any declarations made by the donor relative to the subject-matter of the gift, should be contemporaneous with them. (*Thompson v. Heffernan*, 4 D. & War. 285; *Hawkins v. Blewitt*, 2 Esp. 664;) and even if there be a delivery to the donee or to some one for him, it will not be good, unless the donor, (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery,) parts with the dominion over the thing given. Thus in *Hawkins v. Blewitt*, (2 Esp. 663,) in an action of trover, for a box containing money and wearing apparel, by an administrator, the case on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but he gave no other directions respecting it, nor said anything about giving it to her. It was, however, further given in evidence, that on the next day, the key was brought to the intestate, who desired it to be taken back, saying that he should want some articles of clothing out of it. The plaintiff had a verdict. Lord Kenyon, C. J., said, "In the case of a donatio mortis causâ, possession must be immediately given; that has been done here; *a [*745] delivery has taken place, but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself." See, also, *Reddel v. Dobree*, 10 Sim. 244; *Tapley v. Kent*, 1 Robert. 400.

A delivery of a thing by way of symbol, according to the opinion of Lord Hardwicke, in the principal case, is not a sufficient delivery. Thus, he held that the delivery of the receipts for South Sea Stock was not a sufficient delivery to constitute a donatio mortis causâ, but he said that an actual transfer, or something amounting to that, would have been necessary. Nor will the delivery of a note not payable to the bearer, (*Miller v. Miller*, 3 P. Wms. 356;) nor in general of a cheque upon a banker, be a sufficient delivery, (*Tate v. Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286;) because a cheque has no rela-

tion to the donor's death : it is a gift to take place immediately, and, being merely an authority to receive a sum of money, it is effectually revoked by the death of the donor. However, in *Lawson v. Lawson*, 1 P. Wms. 41, where A., during his last illness, drew a bill upon a goldsmith for the payment of £100 to his wife, with a written endorsement, that the money was "to buy her mourning," and A. delivered the note to his wife, it was held that she was entitled to the money. And Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 111, notwithstanding Lord Hardwicke, in the principal case, throws some doubt upon it, considered the case perfectly well decided. "For," he observed, "taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of £100, for the particular purpose expressed in a written appointment; *which is a purpose that necessarily supposes his death.*"

In *Jones v. Selby*, Prec. Ch. 300, where it was held by Sir John Trevor, M. R., that the delivery of the key of a trunk, with words of gift of the trunk and its contents, were a good delivery of a tally upon government for £500 contained in the trunk, Lord Hardwicke observes, that the transaction "amounted to the same thing as a delivery of possession of the tally, provided it was in the trunk at the time."

In *Boutts v. Ellis*, 4 De G. M. & G. 249, a person four days before his death said to his wife : "I am a dying man, you will want money before my affairs are wound up." *On the following day he signed and delivered to her a crossed cheque upon his bankers for £1000, and on [*746] the next day but one, remembering that the cheque was crossed, he asked a friend who visited him to take it, and give the wife another for it; which the friend did, but his cheque was post-dated. The donor's cheque was paid before his death to his friend, who, after that event, gave to the widow a cheque not post-dated for the other. It was held by the Lords Justices, affirming the decision of Sir J. Romilly, M. R., (reported 17 Beav. 121,) that the transaction constituted a good *donatio mortis causâ*.

The case of *Snellgrove v. Baily*, (3 Atk. 214; Ridg. Ca. t. Hardw. 202,) has established, that there may be a *donatio mortis causâ* of a bond, though not of a mere simple contract debt, nor by the delivery of a mere symbol.—Per Sir John Leach, V. C., in *Gardner v. Parker*, 3 Madd. 185; and see *Blount v. Burrow*, 4 Bro. C. C. 71; *Hurst v. Beach*, 5 Madd. 351, 356; *Clavering v. Yorke*, 2 Coll. 363, n. So, likewise, of bank-notes, (*Shanley v. Harvey*, 2 Ed. Rep. 125; *Ashton v. Dawson*, Sel. Ch. Cas. 14;) and, it seems, also, of all other notes, or bills payable to the bearer: *Miller v. Miller*, 3 P. Wms. 356; *Hill v. Chapman*, 2 Bro. C. C. 612; and see *Jones v. Selby*, Prec. Ch. 300; *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n. And the delivery of a bond is still sufficient as a *donatio mortis causâ* of the debt for which it is a security, although an action may, in certain cases, be maintained at law without profert of the bond: *Duffield v. Elwes*, 1 Bligh, N. S. 543.

A delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causâ*. This was decided in the case of *Duffield v. Elwes*, 1 Bligh, N. S. 497; 1 Dow. & C. 1, in the House of Lords, (overruling the decision of Sir John Leach, V. C., reported 1 S. & S. 239.) In that case, a

man, in contemplation of speedily approaching death, wishing to make a larger provision for his daughter than he had done by will, delivered, or caused to be delivered, to her, certain deeds, which consisted of, 1. A conveyance in fee of lands to secure £2927, with the usual covenant for payment of the money lent, and a bond, by way of collateral security. 2. An assignment of a mortgage debt of £30,000, and of a judgment for that sum recovered on a bond, with the conveyance of the land, and the usual covenant for the payment of the money. Sir John Leach, V. C., in deciding that the gift did not constitute a good *donatio mortis causâ* even of the bond, which accompanied one of the mortgages, observed, that where delivery would not execute a complete gift *inter vivos*, it could not create a *donatio mortis causâ*, because it would not [*747] *prevent the property from vesting in the executors; and, as a court of equity would not *inter vivos* compel a party to complete his gift, so it would not compel the executor to complete the gift of his testator. The delivery of a mortgage deed could not pass the property *inter vivos*; first, because the action for the money must still be in the name of the donor; and, secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which could only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift by executing such a deed. As to the case where the bond accompanied the mortgage, he came to the same conclusion, as he thought that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed, as the mortgagor had a right to resist the payment of the bond, without a reconveyance of the estate; and it could not be maintained, that the donor of the bond would be compelled to complete his gift by such reconveyance. It was held, however, by the House of Lords, that there was a good *donatio mortis causâ*, and that the daughter was entitled to the benefit of the securities. "If," said Lord Eldon, "the delivery of a bond would, as it is admitted—(notwithstanding any change in the doctrine about *profert*)—if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether, the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question, to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty is delivered; with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contra-distinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?"

"The opinion which I have formed is, that this is a good *donatio mortis*

causâ, raising by operation of law a trust; a trust which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a court of equity will execute." See, also, *Merideth v. Watson*, 17 Jur. [*748] 1063.

The delivery by a creditor to the debtor or his agent of that which is essential to the recovery of the debt is, it seems, sufficient. Thus, in *Moore v. Darton*, 4 De G. & Sm. 517, where, upon a loan, the borrower had given the lender a receipt in the following form: "Received of Miss Darton £500, to bear interest at £4 per cent. per annum," it was held by Lord Justice Knight Bruce, (then V. C.,) that a delivery of the receipt to an agent of the borrower by the creditor on her death-bed stating that she wished the debt to be cancelled, was a good *donatio mortis causâ*. "It is true, said his Lordship, "that the delivery of a bond is not the delivery of the mere evidence of a debt, for it is the delivery of that without which the debt would not have been a specialty. Its continuance in existence is not now material, however that might have been considered formerly. The delivery of an instrument creating a specialty debt, without which it would not have been a specialty debt, as in the case of a bond, would be sufficient for the purpose of a *donatio mortis causâ*; and so Lord Eldon decided as to a mortgage. That, however, I agree, does not go the length of deciding that the delivery of the mere evidence of a debt would be sufficient. In this case there was something more. The document here has been called a receipt, and is a receipt in a sense, but it is not a receipt in the ordinary acceptation of that term. It was a document contemporaneous, I take it, with the creation of the debt. It was delivered to the agent of the debtor himself. The debt was a debt carrying interest. A mere debt of £500 would have arisen from a loan, without any writing. But it would not have been a debt carrying interest, without a contract to that effect beyond the advance. That particular contract I agree might have been entered into without writing; but as it was created by writing, proof of the writing, if possible, was essential to recovery upon the contract. This writing was, therefore, essential to the proof of the contract; and it is this writing which was in substance delivered *mortis causâ* to the person owing the money. In my opinion it is consistent with what was said by Lord Hardwicke, Lord Rosslyn, and Lord Eldon, with the civil law, and our own, to hold as I do, that this was a sufficient delivery to constitute a *donatio mortis causâ*, which, in my judgment, it was intended to be."

It is clear that a *donatio mortis causâ* cannot be made merely by parol, without delivery, as in the case of the alleged gift of the household goods and plate in the principal case: see *Tate v. Hilbert*, 2 Ves. jun. 120; *Smith v. Smith*, 2 Stra. 955.

In *Spratley v. Wilson*, 1 Holt, *10, Gibbs, C. J., held, that it was a sufficient delivery where a person in extremis said, "I have left my [*749] watch at Mr. R.'s, at Charing Cross: fetch it away, and I will make you a present of it;" but, upon this case being cited in *Bunn v. Markham*, 7 Taunt. 227, Gibbs, C. J., desired that it might be laid out of the consideration of counsel, for that, immediately after that trial, he perceived that what he had some-

what unprovidently thrown out could not be maintained, because a delivery was wanting, and he had accordingly written a remark to that effect at the end of his own note of the case.

In *Bunn v. Markham*, 7 Taunt. 224, a person, supposing himself in extremis, caused India bonds, bank notes, and guineas, to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them, with the words, "For Mrs. and Miss C.," the plaintiffs; he then directed the brother to replace them in the iron chest, to be locked up, the keys to be sealed up, and directed "to be delivered to J.," (his solicitor,) and one of his executors, after his decease, and replaced in his own custody near his bed; and afterwards spoke of this property as given to the plaintiffs. It was held not to be a donatio mortis causâ, for want of a sufficient delivery, and on account of the donor continuing in possession. See, also, *Farquharson v. Cave*, 2 Coll. 356; *Walsh v. Studdart*, 4 D. & W. 159; *Thompson v. Heffernan*, 4 D. & W. 285.

In the principal case, Lord Hardwicke says, "that a gift mortis causâ may be made in writing as well as otherwise, and that so it might by the Roman and civil law." And see his observations in *Johnson v. Smith*, 1 Ves. 314; and Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 120, says, that "perhaps it might not be difficult to conceive that it might be by deed or by writing." But a gift in writing, without delivery, would probably be considered as testamentary: *Rigden v. Vallier*, 2 Ves. 258; *Tapley v. Kent*, 1 Robert. 400.

The evidence to establish a donatio mortis causâ should be clear and satisfactory, especially in those cases where the relation between the donor and donee is such as to give rise to suspicion that undue influence may have been used, as in the case of an alleged donation from a client to his solicitor, (*Walsh v. Studdart*, 4 D. & W. 159,) or from a person in extremis to a priest attending him to administer the last offices of religion: (*Thompson v. Heffernan*, Ib. 285.)

Where there is any doubt, whether, in point of fact, there was that which would constitute a good donatio mortis causâ, if in point of law the subject of it can be made the subject of a donatio mortis causâ, it is a very familiar thing to direct an issue or issues to try that *fact.—Per Lord Eldon, in *Duffield v. Elwes*, 1 Bligh, N. S. 531; and see *Blount v. Burrow*, 4 Bro. C. C. 71.

A donatio mortis causâ resembles a legacy, inasmuch as it is ambulatory and incomplete during the life of the donor, and may be revoked by him at any time before death, and is subject to his debts on a deficiency of assets; (*Smith v. Casen*, 1 P. Wms. 406;) is subject to legacy duty; (36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76;) and may be made to the wife of the donor: *Jones v. Selby*, Prec. Ch. 300; *Johnson v. Smith*, 1 Ves. 314; *Tate v. Leithead*, Kay, 658, 659. And in these respects it differs from a gift inter vivos.

A donatio mortis causâ differs in other respects from a gift inter vivos, as may be seen by reference to the note to *Ellison v. Ellison*, ante, p. 208; for instance, a mere delivery of a bond, or of mortgage deeds, although it would

be a good *donatio mortis causâ*, would clearly be bad as a gift *inter vivos*, because the donor had not either made a complete transfer to the donee, or constituted himself trustee for him.

But a *donatio mortis causâ* differs from a legacy, inasmuch as it does not require probate, and is taken against, and not from, the executor, whose assent to its enjoyment is not necessary. Thus, in *Thompson v. Hodgson*, 2 Stra. 777, where an executor proceeded in the spiritual court against a person for taking, without his consent, a tankard, which the testator gave to him, if he died of his then sickness, a court of common law granted a prohibition, as it was not a legacy but a *donatio mortis causâ*, the validity whereof might be tried in an action of trover.

If the donor recover of his illness, or if he resume the possession of the gift, it will be defeated. "All the cases," says Gibbs, C. J., "agree, that if the donor resumes the possession, it ends the gift. Lord Hardwicke expressly so holds, in *Ward v. Turner*, where it suited the purpose of the counsel to argue, that, if the donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord Hardwicke immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end." *Bunn v. Markham*, 7 Taunt. 231. But if the donor does not resume the gift, he cannot revoke it by will, for upon his death the gift becomes complete. See *Jones v. Selby*, Prec. Ch. 300; but it was decided in that case, that it may be satisfied by a legacy.

It is clear that the donee may be put to his election, if the subject of the donation is bequeathed to another person, and some benefit is conferred by the will upon the donee. See *Johnson v. Smith*, 1 Ves. 314.

The Wills Act (1 Vict. c. 26,) has not abolished donations *mortis causâ*, and they have been since expressly recognized by 8 & 9 Vict. [*751] c. 76, s. 4. With reference to this subject, Lord Justice Knight Bruce, when Vice-Chancellor, observed: "I confess that it appeared to me not free from doubt, whether the Wills Act had not precluded any donations *mortis causâ* from taking effect. But it does not seem to have ever been so decided or so argued. If against the ordinary rules of construction, a statute passed for the purposes of the revenue can be referred to for the purpose of determining a question of law beyond its scope, it appears that a Revenue Act has in a manner recognized the existence of such gifts. My own opinion is, that according to the true interpretation of the Wills Act, that statute does not avoid such donations." *Moore v. Darton*, 4 De G. & Sm. 519.

"A *donatio causâ mortis*," says Tilghman, C. J., in *Wells v. Tucker*, 3 Binney, 366, 370, "is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers,

the gift shall be void. So also it shall be void, if the donee dies before the donor." But the nature of a gift *mortis causâ* is more ably and accurately expounded by Gibson, C. J., in *Nicholas v. Adams*, 2 Wharton, 17, 22, than

by any judge. "Perhaps the best definition of this species of donation in the books of the civil law," he remarks, "and the one which best corresponds to the best impressions the subject has received from the Anglo-Saxon jurists—who seem to be returning to the point from which they started—is, that which is found in Justinian's Institutes, Lib. 2, Tit. 7: "*Mortis causâ donatio est quæ, propter mortis fit suspicionem; cum quis ita donat, ut si quis humanitus, haberet is qui accepit; sin autem supervixisset, is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decesseret is cui donatum sit.*" Not a word in any part of this about sickness, first or last. Contested death-bed donations are of such occurrence in the courts, as to have superseded all others, and to have grown, in the apprehension of the judges, from a species to a genus; and hence the notion that they are referable exclusively to death-bed sickness. If made in sickness, it must necessarily be the last sickness; for the contingency happens adversely to the donee, where the donor is restored to health. But this notion seems to be yielding to more comprehensive principles. In his Treatise on Legacies, page 26, Mr. Roper, whose accuracy as a text-writer is creditable to him, says, it is necessary that the gift be made in peril of death, or during the donor's last illness, and to take effect only in case he die. This would be critically correct, were it not redundant in one particular, and too narrow in another; redundant, because it is indifferent whether the peril of death be induced by sickness or any other cause. Thus, the peril past, the gift of a soldier or a malefactor might be retracted,

though made in perfect health, when going to execution or to battle. But his position is also too narrow in one particular; for a groundless apprehension of death is necessarily as operative to make a gift conditional, as if the danger were real. No one would hesitate to say that the gift of a man in the predicament of Parolles, when sportively doomed by his friends, in the guise of ferocious enemies, might be recalled. I would, therefore, briefly define a *donatio causâ mortis* to be a conditional gift, dependent on the contingency of expected death. There may, doubtless, be a conditional gift, when death is not expected; but in that case, the condition would have to be expressed, and the contingency specified; in the *donatio causâ mortis*, both are implied from the occasion. But it is certainly not necessary that the donor be in such extremity as is requisite to give effect to a nuncupation, which is sustained from necessity merely, where the donor was prevented by the urgency of dissolution, from making a formal bequest. Between these ways of disposition, there is not one approximating line. *Donatio causâ mortis* is sometimes spoken of as being distinct from a gift *inter vivos*; the former being sometimes supposed to be made in reference to the donor's death, and not to vest before it—but inaccurately as it seems to me; as this gift, like every other, is not executory, but executed in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The donee would certainly not be bound to make compensation for the intermediate use of the thing; and evidently because the intermediate

ownership was vested in him. The gift is consequently *inter vivos*. All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts in the event of a deficiency. The first is, not because the gift is testamentary, but because such is the condition annexed to it; and the second, not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors; for no man may give his property, who is unable to pay his debts. It is decisive, that the subject is not within the jurisdiction of the ecclesiastical courts; and the donee, consequently, takes paramount to the executor or legatee. "*Donatio mortis causâ*," says the court, in *Raymond v. Sellick*, 10 Connecticut, 480, 484, 485, "differs from a gift *inter vivos* in several respects, in which it resembles a legacy. It is ambulatory, incomplete, and revocable during the donor's life. The revocation may be effected either by the recovery of the donor from his disorder, or by taking back the possession of the property. It can be made to the wife of the donor. On the other hand, it differs from a legacy in several particulars. The claim need not be proved in a court of probate. The title of the donee becomes, by relation, complete and absolute from the time of the delivery. No consent or other act, on the part of the executor or administrator, is necessary to perfect the title of the donee. It is a claim against the executor; a legacy is a claim from the executor." See, to the same effect, *Harris v. Clark*, 2 Barbour's S. C. 94, 96; *Parish v. Stone*, 14 Pickering, 198, 203.

[It has been held, that gifts *causâ*

mortis must be limited to chattels, and cannot be made of land. And in *Mears v. Mears*, 24 Vermont, 59, the court held, that a gift of land, made by a husband to a wife, on his death-bed, which failed as a settlement, in consequence of the excessive and unreasonable nature of its provisions, could not be supported as a donation *causâ mortis*.

The power of a married woman to make a donation *causâ mortis*, rises no higher than that to bequeath by will; and the gift, consequently, will not be valid without the consent of the husband, which must be shown affirmatively, by those who seek to sustain it; *Jones v. Brown*, 34 New Hampshire, 439.]

To constitute a *donatio mortis causâ*, it is necessary that the gift be made in contemplation of the conceived approach of death, and with a view of being void in case the donor survives; *Grattan v. Appleton et al.*, 3 Story, 755, 763; *Weston v. Hight*, 17 Maine, 287, 290; *Raymond v. Sellick*, 10 Connecticut, 480, 484, 485; *Harris v. Clark*, 2 Barbour's S. C. 94, 96; *Holley v. Adams, Adm'r*, 16 Vermont, 206, 210, 212; *Smith et al. v. Kittridge et al.*, 21 Id. 238, 245; *Hebb et al. v. Hebb*, 5 Gill, 506; *Gilmore v. Whitesides and others*, Dudley's Equity, 14, 18. Though subject to defeasance by the donor's restoration from danger, and in other ways, the property must pass at the time, and not to be intended to pass at the giver's death; *Duncan's Adm'rs v. Duncan*, 5 Littell, 12, 13; *Walden's Adm'r v. Dixon*, 5 Monroe, 170, 171. If the danger of death passes by, the gift is void; *Weston v. Hight*, 17 Maine, 287, 290; and the gift is revocable by the donor during his life; *Parker v. Mar-*

ston, 27 Maine, 196, 203; *Nicholas v. Adams*, 2 Wharton, 17, 23. And it will not prevail against creditors; *Borneman v. Sidlinger*, 15 Maine, 429. What will be sufficient evidence of an intention to revoke the gift, depends on circumstances; and a bequest to a third person, of all the testator's property, will not necessarily operate as a revocation of a prior donation *causâ mortis* of part; *Nicholas v. Adams*.

It is indispensable to the validity of a gift *mortis causâ*, that it be perfected by a present delivery. In the civil law, some species of *donatio mortis causâ*, were valid, without delivery, but in the common law, the cases are uniform in declaring that a delivery, according to the subject of the gift, is in every instance necessary: *Bowers v. Hurd*, *Adm'r*, 10 Massachusetts, 427, 429; *McDowell v. Murdock*, 1 Nott & McCord, 237, 239; *Gilmore v. Whitesides and others*, *Dudley's Equity*, 14, 18, 23; *Grattan v. Appleton et al.*, 3 Story, 755, 763; *Raymond v. Sellick*, 10 Connecticut, 480, 484; *Harris v. Clark*, 2 Barbour's S. Ct. 94, 96; *Huntington v. Gilmore*, 14 Id. 243; *Holley v. Adams*, *Adm'r*, 16 Vermont, 206, 210, 212; *Carpenter v. Dodge et al.*, 20 Id. 596; *Roberts v. Wills*, Spencer, 591; *Hobb v. Hobb*, 5 Gill, 516; *Jones v. Dyer*, 16 Alabama, 231; *Noble v. Smith*, 2 Johnson, 56; *Chevallier v. Wilson and Wife*, 1 Texas, 161, 174; *Duncan's Adm'r's v. Duncan*, 5 Little, 12, 13; *Ewing v. Ewing*, 2 Leigh, 337, 341, 344; *Barker v. Barker's Adm'r*, 2 Grattan, 344; *Lee v. Luther*, 3 Woodbury & Minot, 519. "It is a wise principle of our law, that delivery is essential, because delivery strengthens

the evidence of the gift. Too much care cannot be taken in insisting on the most convincing evidence in cases of this kind; for these donations do in effect amount to a revocation *pro tanto*, of written wills; and not being subject to the forms prescribed for nuncupative wills, they are certainly of a dangerous nature." *Per* Tilghman, C. J., in *Wells v. Tucker*, 3 Binney, 366, 360. Such donations are not the less gifts because they are gifts upon condition, and they must, consequently, have all the elements necessary to the validity of gifts in other cases.

The delivery must be according to the manner in which the particular thing is capable of being delivered; *Pennington, Adm'r of Patterson v. Gittings, Ex'r*, 2 Gill & J. 209, 216; and the delivery of the key of a chest, may be a good delivery of its contents, even when they consist of promissory notes and other securities for the payment of money; *Jones v. Brown*, 34 New Hampshire, 439.

"A *donatio mortis causâ*," says the court, in *Miller and Wife v. Jeffress et als.*, 4 Grattan, 472, 479, "is of a mixed character, partly testamentary and partly donative; from an indulgence to the nature of the emergency, the law dispenses with the solemnities of a testament; and for that very reason requires the essentials of a gift. A delivery is indispensable to the validity of a *donatio mortis causâ*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or, if the thing be in action, of the instrument by using which the

chose is to be reduced into possession, as a bond, or a receipt, or the like.

. . . It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causâ*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor, or bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person." And this view is sustained by *Lee v. Luther*, 3 Woodbury & Minot, 519. See *Sims v. Walker*, 8 Humphreys, 503, 505.

A delivery to a third person for the use of the intended donee, is a valid *donatio mortis causâ*; *Wells v. Tucker*, 3 Binney, 366, 370; *Coutant v. Schuyler*, 1 Paige, 316, 318; *M^r Gillicuddy v. Cook*, 5 Blackford, 179, 180; *Borneman v. Sidlinger*, 15 Maine, 429; 18 Id. 225; 21 Id. 185; *Sessions v. Mosely*, 4 Cushing, 87. [But no delivery can give validity to a gift of any description, unless so far complete and actual as to put an end to the dominion of the donor, and confer the right of property and possession on the donee, subject only when donations *causâ mortis* are in question, to those contingencies which belong to the nature of the gift; *Hatch v. Davis*, 3 Maryland Ch. 266; *Dole v. Lincoln*, 31 Maine, 422. To render a delivery to a third person effectual, he must, consequently, receive it as the agent of the donee, and not of the giver; and hence the delivery of a note by one man to another, with di-

rections to collect it and apply the proceeds for the benefit of a third, will not operate as a gift *inter vivos* or *causâ mortis*, nor confer any right on the latter, unless the circumstances are such as to show that the intention was to make an immediate transfer, and not to confer a mere authority or power; *Thompson v. Dorsey*, 4 Maryland Ch. 149, ante, 335; *Sessions v. Mosely*, post, vol. 2, note to *Ryall v. Rowles*. But the delivery of a gift, *causâ mortis*, to a third person for the use of the donee, will not, necessarily, be invalidated by a condition that the thing given shall be re-delivered, if the donor recover, because this would be implied from the nature of the gift, if nothing were said by the giver; *Sessions v. Mosely*. In this respect, gifts *causâ mortis* differ essentially from those *inter vivos*, a right of revocation being incident to the one, and fatal to the validity of the other.]

"There are many strong expressions in the books of the common law," said the Assistant Vice-Chancellor in *Brinckerhoff v. Lawrence*, 2 Sandford, 401, 406, "against sustaining donations, either *mortis causâ* or *inter vivos*, without actual delivery. The reason of this is, that gifts of both classes are usually claimed upon parol evidence, unsustained by any writing; and the courts have uniformly set their faces against such claims, on account of the great danger of perjury. Where the intent of the donor is proved under his own hand, there is no such danger, and the courts have accordingly presumed a delivery in support of the gift, on slight evidence. So far as concerns the question of intent, a writing may be more satisfactory than parol; but the principle as to the necessity of delivery to the com-

pleteness of the transaction is the same in both cases. Unless a delivery be proved by competent evidence, a deed conveying chattels will not make a valid *donatio mortis causâ*; see *Gilmore v. Whatsides and others*, *Dudley's Equity*, 14, 18; *Nicholas v. Adams*, 2 *Wharton*, 17, 24. In *Mears v. Mears*, 22 *Vermont*, the point was, notwithstanding, decided the other way, and the want of an actual delivery, held to be supplied by that of a deed duly executed and purporting to pass the thing given.

The principle established in *Ward v. Turner*, and the authority of that decision, were fully recognized and enforced in *Pennington, Adm'r of Patterson v. Gitting's Ex'or*, 2 *Gill & Johnson*, 209, which closely resembled *Ward v. Turner*. The decedent, in immediate expectation of death, had delivered to his daughter, a certificate of bank stock, at the same time indorsing his name on the back of the certificate, and telling his daughter that he gave the stock to her. The donation was held invalid. "It appears upon the face of the certificate itself," said *Buchanan, Ch. J.*, "that the stock was transferable at the bank only, and it is admitted that the indorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate that was the subject of the intended gift, it matters not whether the indorsement was in full or in blank; for, as in the case of the check on the banker, which not being presented and paid in the lifetime of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the check might, by presenting it in the lifetime of the maker,

have obtained the money, and thus perfected the gift; so here, even if by the indorsement of the certificate, whether filled up or remaining in blank, the donee might have gone to the bank in the lifetime of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery;" see *ante*, 334.

"Whatever differences there may be amongst the courts of some of the states," said *Shaw, Ch. J.*, in *Coffin and Wife v. Otis*, 11 *Metcalf*, 156, 161, "in regard to what may be the subject of a gift, *mortis causâ*, it is, we believe, agreed on all hands, that it must be some chattel, or some note or other security for money, capable of tradition or manual delivery; and that there must be an actual delivery either to the donee, or to some person for his use."

It is perfectly settled, in the present day, that *choses in action*, or at least, instruments creating a liability against a third party, held by the donor, are the subject of a valid *donatio mortis causâ*. A bond is undoubtedly the subject of a good donation *mortis causâ*; *Wells v. Tucker*, 3 *Binney*, 366; *Waring v. Edwards*, 11 *Maryland*, 424; *Lee v. Boak*, 11 *Grattan*, 182. And the American cases conclusively establish that the promissory note of a third person stands in this respect upon the same footing with a bond; and it matters not whether the note be payable to bearer, or indorsed in blank, so that a legal title vests in the delivery, or whether it be

payable to the donor only, and the delivery vests but an equitable title in the donee; in the latter case, the donee would be entitled to use the name of the administrator of the donor's estate, in suing upon the note, and may control the administrator if he attempts to sue for the benefit of the estate generally; *Coutant v. Schuyler*, 1 Paige, 316, 318; *Holley v. Adams, Adm'r*, 16 Vermont, 206, 211; *Smith v. Kittridge et al.*, 21 Id. 238, 242; *Grover v. Grover*, 24 Pickering, 261, 264, 266; *Sessions v. Mosely*, 4 Cushing, 87; *Borneman v. Sidlinger*, 15 Maine, 429; 18 Id. 225; 21 Id. 185; *Parker v. Marston*. 27 Id. 196, 204; *Brown, Ex'r, v. Brown*, 18 Connecticut, 410, 413; *Jones v. Dyer*, 16 Alabama, 221. "Notwithstanding the attempts which have been made in England," said the chancellor, in *Coutant v. Schuyler*, "to distinguish between a promissory note and a bond, in relation to the validity of the gift of a *chose in action*, there cannot, in reason, be any difference. A gift of either is valid as a symbolical delivery of the debt due on the note or bond, and all the delivery of which the subject is capable." A note, secured by mortgage, passes equally well by a gift and delivery *mortis causâ*; *Brown, Ex'r, v. Brown*; *Borneman v. Sidlinger*.

But it is equally well settled, that the donor's own promissory note to the donee, or any other executory promise of his without consideration, cannot be the subject of a *donatio mortis causâ*; *Raymond v. Sellick*, 10 Connecticut, 480, 485; *Parish v. Stone*, 14 Pickering, 198, 204; *Holley v. Adams, Adm'r*, 16 Vermont, 206; *Smith v. Kittridge, Adm'r*, 21 Id. 238; *Flint v. Pettee*, 33 New Hamp-

shire, 520; *Harris v. Clark*, 2 Barbour, 94; 3 Comstock, 93; *Craig v. Craig*, 3 Barbour's Chancery, 78, 118. In like manner, the gift of a draft, drawn by the decedent on a third person, so far as it can be made available as a security, or as a written evidence of debt, against the drawee, may be valid as a *donatio mortis causâ*: but as creating any liability against the estate of the drawer, in the event of the drawee not paying, it is inoperative. [The law was so held in *Harris v. Clark*, 2 Barbour, 94; 3 Comstock, 93; overruling *Wright v. Wright*, 1 Cowen, 598; and deciding that a bill of exchange or draft, drawn generally, cannot be made the subject of a valid donation *causâ mortis*, before or without acceptance; because, it is, in point of legal construction, nothing but a direction or authority to pay, coupled with an implied promise that payment shall be made in accordance with the order. But it seems to have been conceded, that a draft drawn on, or limited to a particular fund, or a check on a bank, might fall within a different principle, by operating as an equitable assignment, and vesting the property in the fund in the donee, from the moment of delivery; *post*, vol. 2, note to *Ryall v. Rowles*.] So, the indorsement, by the donor, *mortis causâ*, of a promissory note made to him, creates no liability against his estate; *Werton v. Hight*, 17 Maine, 287, 290. And these cases are sustained by *Greenfield's Estate*, 12 Harris, 232, which decides, that a draft cannot operate as a valid gift *inter vivos*, unless the money is paid, or set apart by the drawee, before the death of the drawer. A bond executed and delivered, as a gift or advancement, does not, however,

fall within the scope of this principle ; the seal supplying the want of a consideration, and making the act binding, as a contract, if not as a donation ; *Candon's Appeal*, 3 Casey, 119. And it would seem well settled, that a debt may be forgiven *causâ mortis*, by a delivery or surrender of the note, or other instrument, which constitutes the evidence of its existence, to the debtor or to a third person, for his benefit ; *Gardner v. Gardner*, 22 Wend. 521 ; *Lee v. Bouck*, 11 Grattan, 182.

The history, and present condition of the law, upon these points, are very satisfactorily traced by Shaw, C. J., in *Parish v. Stone*, 14 Pickering, 198, 204, 205. "The necessity of an actual delivery," he remarks, "has been uniformly insisted upon, in the application of the rules of the English law to this species of gift. It was, in some measure, from the strict application of this rule, and from the impossibility of making an actual delivery of that species of property, that it was long doubted whether *choses in action*, that is, bonds, notes, and other securities for money, could, in any way, be the subject of such a gift. In the case of *Ward v. Turner*, 2 Ves. sen. 431, where the whole subject was very fully discussed, and where the doctrine of actual delivery was insisted on as indispensable, it was held by Lord Hardwicke, that a gift of receipts for South Sea annuities was not a good *donatio causâ mortis*, principally because the property in the stock did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. But it has since been decided, that a delivery of such securities and *choses in action*, as pass a property to the bearer by delivery, may properly be the subject of this species of gift,

where the securities are delivered, as bank notes or specie bills ; *Drury v. Smith*, 1 P. Wms. 404 ; lottery tickets ; *Gold v. Rutland*, 1 Eq. Cases, Abr. 346 ; and Exchequer tallies ; *Jones v. Selby*, Prec. Chan. 300. And there can be no reasonable doubt that a promissory note payable to bearer, or indorsed in blank, so as to pass by delivery, might also pass by a gift and actual delivery, as a *donatio causâ mortis*.

But whatever doubt may have existed, it has been decided, that as an assignment of a *chose in action* is now recognized as a good transfer of the equitable interest, and as such equitable assignment is manifested by a delivery over of the bond or other security for money, by a gift of such a bond, accompanied by an actual delivery of the bond, an equitable interest vests in the donee and the executors of the donor, in whom the legal interest remains, are mere trustees for the donee, and bound to permit the donee to use their names, to enforce the payment of the bond at law ; *Snellgrove v. Baily*, 3 Atk. 214 ; *Gardner v. Parker*, 3 Maddock, 184 ; *Blount v. Burrow*, 4 Bro. C. C. 72. And as a confirmation and necessary consequence of this doctrine, it has also been held, that a bond and mortgage may be a good subject of a gift ; that an equitable interest in the money secured by the personal obligation, passes by a gift and delivery over of the security, that the mortgage attends and follows the debt, as an inseparable incident ; that although the legal interest in the debt vests in the executor, and that of the mortgaged premises in the heir of the donor, yet in equity they are both to be considered trustees for the donee of the debt

or sum of money secured by the mortgage, the executor, to permit the donee to sue in his name on the personal security, and the heir, to convey the mortgaged premises, in security of the debt; *Duffield v. Elwes*, 1 Bligh's New Rep. 514; S. C., under the name of *Dow v. Hicks*, 1 Dow & Clark, 1, in the House of Lords. These cases all go on the assumption, that a bond, note, or other security, is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession; all which ingredients are wanting in his own note given by the donor to the donee, without consideration, which is a mere gratuitous promise."

[In general, voluntary assignments are not aided by equity, unless the legal title is passed, or the omission excused by the failure of the law to provide the means of transfer; and hence, while the delivery of a bond to a stranger, with an intent to pass the right of property, may be sustained by equity, as a gift, in view of the impossibility of passing the title at law; the delivery of a note, or other negotiable security, would probably be held equally invalid, in both jurisdictions, unless the instrument were endorsed, or made payable to bearer. But the cases cited above show, that gifts *causa mortis* stand on a more favorable footing, in this particular, than those wholly *inter vivos*, and may be valid without a transfer of the legal title, even when it might have been transferred without difficulty, and no steps have been taken to transfer it. And this view is sustained by the lan-

guage held by Gridley, J., in delivering the judgment of the court in *Harris v. Clark*, 2 Barbour, 94, 98.] "It is now settled by adjudged cases, that promissory notes, and bills of exchange, whether payable to order or not, and whether indorsed or not, bonds and mortgages, and all instruments in writing, by which any debt against a third person is secured, may be the subjects of a *donatio causâ mortis*. In the case of *Duffield v. Elwes*, (1 Bligh, N. S. 497,) Lord Eldon, in a very elaborate judgment, in which he reviewed all the previous cases, came to the conclusion that a mortgage deed was the subject of transfer by mere delivery, as a *donatio mortis causâ*; reversing the decree of the Master of the Rolls, who had held the contrary doctrine. The principle established in this case is, that in the case of the gift of a bond or mortgage, there is a trust raised which a court of equity will enforce, by compelling the executors to allow the use of their names in any legal proceeding necessary to enforce the security against the debtor, for the purpose of carrying into effect the intention of the donor. In this respect there is a manifest distinction between a gift *inter vivos*, and a *donatio mortis causâ*. In the former case a court of equity will not compel a donor to complete his gift, nor an executor to complete the gift of his testator; whereas, as we have seen, in the latter case, the donor may successfully invoke the aid of the Court of Chancery for that purpose."

[In *Headly v. Kirby*, 6 Harris, 326, a *donatio mortis causâ*, which embraced all the donor's property, was said to be a nuncupative bequest, in the disguise of a gift, and therefore invalid, for want of the formalities

prescribed by the Statute of Wills, although the things given were personal property, and were present in the room at the time when the donation was made. This reasoning would, however, seem as applicable to a gift of part of the estate of the decedent, as of the whole; and it may be asked, if the whole cannot be given, how

much less than the whole will the law deem a part? In *Meach v. Meach*, 24 Vermont, 591, the question was decided directly the other way, and a gift *causâ mortis*, held to be equally valid, whether it embraced all the property of the donor, or was limited to part.]

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- Secus, where the power is in the nature of a trust, 789, 790.
- Where the direction to sell is peremptory, but the time of sale discretionary, conversion takes place, 791, 804.*
- Of land into money may be implied, 790.
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- Where direction to convert is imperative, legacy duty is payable, *ib.*
- Even though person entitled elects to take the land, *ib.*
- Secus, where direction is discretionary, and trustees do not sell, *ib.*
- But it may if trustees do sell, *ib.*
- Doubtful whether liability to duty should depend upon act of trustees, *ib.*
- But it will not if sale takes place not under the power, but under jurisdiction of the court, *ib.*
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- A fortiori, if they are directed simply to re-invest in the purchase of lands, *ib.*
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- As where she is directed to pay certain rent, to repair, and not to alien, 392.
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 Or where power of leasing is given, 393, 394.
 Or a direction to cut down timber, 394.
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 Receipt of rent and profits of two properties between which party bound to elect, not considered as, 397.
 Nor if he mortgages one property not yielding rents, and receives rent of the other, 398.
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 By married woman, ib.
 With regard to reversionary interest in personalty, 400.
 Where time is limited for, ib.
 Parties disappointed by heir electing to take estate contracted for by testator, have no lien on estate, ib.
 But after heir's death, may prove against his estate for amount which he received under will, ib.
 Legacy duty not payable on personal estate given up by one legatee to another under doctrine of election, ib.
 Secus, where testator bequeaths personal property of another, ib.
 2. Election to take land or money in its actual state may be made by the absolute owner, 794, 805, 806.
 Infant cannot elect except it be found by the court to be for his benefit, 794, 806.
 Nor a lunatic, 794.
 Nor a feme covert by contract or ordinary deed, 795, 806.
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Remainderman may elect, 795.

But not so as to affect prior interests, *ib*.

As to election of tenant in tail of money to be laid out in land, 796.

Election may be made by express declaration, 796, 797, 807.

By acts from which election may be presumed, *ib*.

But acts having reference to land in possession, are not indicative of intention to reconvert those in reversion, 798.

By declaration of trust in deed, *ib*.

By reservation of rent in lease, *ib*.

By receipt of money to be laid out in land, *ib*.

Principle on which election proceeds, 798, 799.

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By conveying property as land, 797, 807.

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By receiving money, 798.

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EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS,

Created by mere deposit of title deeds, notwithstanding the Statute of Frauds, 650.

And gives an interest in the land, *ib*.

Deposit of a copy of court roll will create, *ib*.

Or of certificates of shares in a public company, *ib*.

Or of a policy of assurance, *ib*.

But notice should be given to company, *ib*.

And a deposit of land order of the New Zealand Company, good without notice, 651.

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Effect of deposit is a contract on the part of mortgagor that his interest shall be liable to debt, *ib*.

And that he will vest it in the mortgagee, *ib*.

But agreement on deposit may show a contrary intention, *ib*.

As to evidence necessary to support an equitable mortgage, *ib*.

May be a security for subsequent advances, 652.

Without re-delivery upon sufficient proof of agreement that they were to be so, *ib*.

And a parol agreement may convert an illegal into a legal mortgage, *ib*.

As when under the old law a deposit was void under usury laws, *ib*.

And illegal mortgage made by mistake may be reformed, 653.

Semble, a deposit for the purpose of preparing a legal mortgage, is a good equitable mortgage, *ib*.

But not where a deposit is made *diverso intuitu*, 654.

Parol evidence not admissible to contradict a memorandum in writing made at the time of the deposit, *ib*.

But is admissible to extend the lien evidenced by the memorandum, *ib*.

Where agreement being unstamped is inadmissible as evidence, other parol evidence may be given, *ib*.

There must, unless under peculiar circumstances, be an actual deposit, *ib*.

Memorandum of deposit of title deeds to secure annuity, formerly required enrolment, 655.

Now registration as against purchaser, mortgagees, and creditors, *ib*.

By deposit in the hands of a third party is sufficient, *ib*.

But not in the hands of a mortgagor's wife, *ib*.

By secretary of a banking company for the bank, in his own office there, *ib*.

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS, *continued.*

Deposit with a firm, 655.

Whether it is necessary to deliver all the title deeds, 656.

Deposit of part of title deeds sufficient, *ib.*

As to the priorities of equitable mortgagees having each part of the deeds, 657.

Over the whole of an estate not created by a deposit of deeds relating only to part, *ib.*

But depositor may be compelled to make good his representations, 658.

Partial owner only affects his own interest by a deposit, *ib.*

One tenant in common joining with another, merely as to his share, *ib.*

Legal mortgagee or depositary may, by delivery of the deeds to another person, transfer the mortgage, *ib.*

A deposit is good against the Crown, when, *ib.*

Against creditors, *ib.*

Unless it be held a fraudulent preference, *ib.*

Against a subsequent judgment-creditor obtaining possession under an *elegit* without notice, *ib.*

Against legal mortgagee, with notice, 659.

When notice will be imputed to legal mortgagee, *ib.*

Notice that title deeds are in possession of another sufficient, *ib.*

Not when he has notice that they are in the possession of solicitor of depositor, *ib.*

Equitable mortgagee parting with title deeds when postponed to subsequent equitable mortgagee, *ib.*

Legal mortgagee or purchaser without notice has priority over equitable mortgagee, 660.

Equitable mortgagee may protect his interest by obtaining the legal estate from his debtor, even in contemplation of his bankruptcy, *ib.*

Entitled to priority over vendor's lien, when, *ib.*

Deposit by trustee in breach of trust does not create an equitable mortgage, 661.

Equitable mortgage, under 27 Eliz. c. 4, is good against a prior voluntary settlement, *ib.*

A depositary of a lease is not compellable to take a legal assignment, so as to render himself liable to the covenants, *ib.*

Although he may have taken possession, or paid the rent, *ib.*

A proviso making void a lease on an assignment does not apply to a mere deposit, 662.

Mortgagee by deposit of lease, may, under Irish Ejectment Act, on eviction of lessee, file a bill for redemption against landlord, when, *ib.*

Deposit of title deeds not within Lord Loughborough's order in bankruptcy, *ib.*

Depositary must petition for sale, and on a mere deposit must pay the cost, *ib.*

Where there is memorandum in writing, he will be entitled to costs out of the estate, *ib.*

What is a sufficient memorandum, *ib.*

Mortgagee held entitled to costs where evidence was given that it was not the custom to have a memorandum, *ib.*

Where equity of redemption has been mortgaged by the bankrupt, a bill must be filed by the depositary, *ib.*

And he is entitled to rents only from the time of the order for sale, *ib.*

Notice to tenants to pay rents does not alter the rule, *ib.*

Where depositor is not bankrupt, bill may be filed for sale, or foreclosure and an absolute conveyance, *ib.*

Six months allowed for redemption, *ib.*

A day must be given to an infant to show cause in a decree for foreclosure, *ib.*

Not in case of a decree for sale, *ib.*

Equitable mortgagee may obtain a receiver, 663.

Will be entitled to interest, though deposit were made only to secure simple contract debt, *ib.*

And will be entitled to money arising from the sale of the good-will of business carried on upon the mortgaged property, *ib.*

And to fixtures, though not mentioned in the memorandum upon the deposit, *ib.*

And fixtures will not be within the order and disposition of bankrupt, *ib.*

Bill by equitable mortgagee also specialty creditor against assets of mortgagor, *ib.*

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS, *continued.*

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Not valid in Pennsylvania, 665.

A written agreement to give a mortgage, or a mortgage which fails from want of due execution at law, may be sustained and enforced in equity, 665, 666.

EQUITABLE WASTE. *See* WASTE.

EQUITY TO A SETTLEMENT,

Of wife, out of her own property, 468, 493.

The same principle prevails in this country, 493, 494.

Jurisdiction first assumed to compel settlement, where the assistance of the court was sought to obtain the property, 468, 495.

Wife may now assert her equity as plaintiff, 468. *See* 496.

Though bill filed by infant in maiden name, by next friend when married clandestinely, *ib.*

When assignee sues, wife may interpose by petition, 499.

It is binding against husband, 468, 498.

His assignees in bankruptcy, 468.

Under the Insolvent Debtors Act, *ib.*

Under an assignment for payment of debts, *ib.*

And against his assignee for valuable consideration, in the case of a capital fund of the wife, 469, 498.

And generally, in this country, against all who claim through or under the husband, 498.

Out of a legacy or residue as against right of executor or administrator to retain or set off for debt of husband to estate, 469.

Wife entitled to settlement out of equitable property, 469, 496.

Or legal property, the subject of a suit in equity, 470, 471, 495.

And generally out of any property within the control, or subject to the jurisdiction of the court, 495.

As where a creditor or assignee seeks to recover a debt by or through the aid of an assignment, which does not transfer the legal title, and therefore confers a right which is merely equitable, 496.

But settlement will not be decreed where husband can recover or obtain possession at law, or by virtue of a legal right, and without the aid of equity or of equitable principles, 496.

Out of sum of money arising from rent of real estate paid into court, 472.

Out of a trust term in land, *ib.*

Out of estate tail in possession, subject to term to secure jointure, 473.

But only during term, *ib.*

Mortgagee in possession, not allowed as against assignees of husband payments to wife, *ib.*

Wife not entitled to out of legal interest in leaseholds as against mortgagee seeking foreclosure or sale, 474.

Entitled to redeem, when, *ib.*

Out of a *life-interest* or income of equitable property, on husband becoming bankrupt or insolvent, *ib.*

Or upon husband deserting his wife, 474, 499.

But not when she is living with and is maintained by him, *ib.*

Nor as against assignee, for valuable consideration, of the husband, 474-478.

Out of property wife is entitled to before as well as after marriage, 477.

But not out of reversionary personal property, *ib.*

But see now 20 & 21 Vict. c. 57, *ib.*

Settlement always extended to *children*, 478, 498.

But the equity is personal to the wife, *ib.*

Children cannot insist upon a settlement after the death of wife, unless she has asserted her right to one, 478, 499.

And she may at any time, before a settlement is completed, defeat their interests by waiving her right, 479, 499.

But if she has not waived her right, having entered into a contract, or obtained a

EQUITY TO A SETTLEMENT, *continued.*

decree for a settlement, the rights of the children will not be defeated by her death, 479, 499.

Although the children are not mentioned in the decree, 479.

Unless omission is for a long time acquiesced in, *ib.*

The rights of the children do not attach upon filing of a bill merely, 480.

Unless the married woman claims a settlement, 480, 481.

Wife may at any time waive her equity to a settlement before it is actually made, though her husband is bound by contract or decree, 482.

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But he loses his priority if he parts with legal estate upon a sale, ib.

But notice of second mortgage is immaterial if third mortgagee advanced his money without notice. ib.

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And he will not be prevented from tacking, by the second mortgagee having given notice of his advance to the first, 598.

But he cannot tack after a decree to settle priorities, *ib.*

Nor can a mortgagee who purchases as trustee for another, *ib.*

Judgment-creditor, or creditor by statute or recognizance, buying in the first mortgage, cannot tack, *ib.*

Nor in any other case where a person does not advance his money upon the faith of the real estate, *ib.*

Seemle, judgment-creditor cannot tack even since 1 & 2 Vict. c. 110, 600.

First mortgagee advancing a further sum upon a statute or judgment, without notice, may tack, *ib.*

A fortiori, if he make an advance upon a mortgage, *ib.*

Subsequent mortgagee cannot tack if he advances his money with notice of a prior incumbrance, *ib.*

Even where he was also first mortgagee upon a mortgage made to secure a sum and further advances, *ib.*

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Where the legal estate is outstanding, all the incumbrances are paid according to priority in point of time, 601.

But any one of them, having the best right to the legal estate, will be in the same state as if he had it, *ib.*

As when he has a declaration of trust in his favor, 602.

Or has possession of a deed creating a term, *ib.*

Mortgagee purchasing equity of redemption, with notice of subsequent incumbrances, takes subject to them, *ib.*

Unless he keep prior mortgages on foot to protect the estate, *ib.*

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And the same rule applies to tenants in common, 94, 95.

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Renewal of lease by, 85, 92.

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Purchase of outstanding title or incumbrance, by trustee, enures to use of cestui que trust, 94.

And this rule extends to executors, administrators, guardians, attorneys, agents, and all others who hold fiduciary relations towards others, 92, 209.

Purchase by a trustee for sale, or by a trustee for him, from cestui que trust, will be set aside, although an adequate price be given, 194, 196, 209, 211.

Although the sale be by auction, 196.

Or by co-trustees, *ib.*

Or before the Master, 196, 216.

Or by trustee as agent for another, *ib.*

General trustee is incapacitated from purchasing at a sale under an adverse proceeding, 215, 216.

Trustees may purchase with leave of court, 217.

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Mortgagee or annuitant with powers of sale cannot, without express authority from the mortgagor, purchase the mortgaged estate, 197, 211.

Nor can solicitor conducting sale, 197.

Mortgagee may purchase equity of redemption from mortgagor, ib.

Surviving partner can purchase share of deceased partner from his representatives, ib.

Trustee cannot take a lease from himself, ib.

When authorized to do so removed from his office, ib.

But a trustee can purchase from a cestui que trust who is sui juris, and has discharged him from the trust, 197, 200.

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A trustee who has disclaimed without acting may purchase, 198.

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ASSIGNEES OF A BANKRUPT—BARRISTER—BISHOP—COMMISSIONER IN BANKRUPTCY—CONSTRUCTIVE TRUSTS—CREDITOR—DIRECTOR—EXECUTION CREDITOR—EXECUTORS—GUARDIAN AND WARD—SOLICITOR—STEWARD—STOCKBROKER—SURETIES—TENANT FOR LIFE.

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Nor a promissory note, *ib.*

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But where a mortgage is taken on part of the purchased estate, the intention is clear that the lien should not extend to the remainder, 356, 365.

And where a mortgage on the estate is taken for part of the purchase-money, and a note given for the remainder, there will be no lien for the money due on the note, *ib.*

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Of volunteers, *ib.*

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Not being an express trust may be barred by Statute of Limitations, 362, 370.

May be taken out of operation of statute by sufficient acknowledgment, *ib.*

And will then be enforced in equity, *ib.*

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Primarily payable therefore out of personal estate of purchaser, *ib.* See MARSHALLING—VENDEE'S LIEN.

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As to what will amount to declaration of trust, ib.

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Distinction between assignment in trust, and declaration of trust, without or apart from assignment, 312.

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Whether voluntary assignment of debt or chose in action evidenced by a written instrument, will be valid without delivery of instrument, so delivered, or of deed of gift, 355.

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Notice of voluntary assignment to trustees or debtors not essential to its validity, 320.

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Covenantee under a voluntary covenant for a further assurance, not allowed to prove as creditor in an administration suit of the covenantor's estate, but allowed to bring action, *ib.*

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Even with notice of a settlement, *ib.*

And though it be a fair provision for a wife and children, *ib.*

Law is same when voluntary settlement made by married woman, *ib.*

But if the trust is complete, volunteers until sale are entitled to have it executed, *ib.*

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Settlor cannot enforce specific performance of contract for sale, 324.

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Settlement of, not defeated by subsequent sale, *ib.*

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Voluntary deed executed pendente lite, to avoid execution, set aside, *ib.*

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Waste by heir at law prevented in the case of an executory devise, 698, 699, 713.

Where there is an intermediate tenant for life, 699, 715.

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Ground landlord may prevent under-lessee committing, 699, 713.

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As to permissive waste, 700.

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Who cannot ordinarily be restrained from committing waste, *ib*.

Tenant for life without impeachment of waste will be restrained from exercising his powers contrary to conscience, 701, 713.

As by pulling down a castle, or mansion-house, or farm-house, *ib*.

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And from committing equitable waste by felling timber planted, or left standing for ornament or shelter, 702.

Same rule applicable to tenant in tail after possibility of issue extinct, *ib*.

Principle on which the court acts, *ib*.

Has been extended to timber at a long distance from a house, *ib*.

To rides or avenues through woods far from house, *ib*.

But not so as to protect woods through which they pass from being cut for repairs, *ib*.

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And to trees planted to exclude objects from view, *ib*.

Circumstances may render cutting of ornamental timber justifiable, *ib*.

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When they are prejudicial to healthiness of a house, *ib*.

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Tenant in tail, without possibility of issue extinct, is within the principle of equitable waste, *ib*.

Form of order restraining equitable waste, 708.

Trust for preservation of ornamental timber enforced, *ib*.

But a court of equity will not interfere with tenant in tail, *ib*.

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When account incident to *injunction*, 715.

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And in all cases of waste in mines, 711, 716.

What can be recovered by action of trover, 711.

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But a tenant for life, who is also owner of the inheritance, will not be allowed to benefit by his own wrong, *ib.*

Thinnings of fir trees belong to tenant for life, 712.

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And capital will be transferred to the first owner of the inheritance, *ib.*

Or to the first tenant for life without impeachment of waste, *ib.*

First owner of the inheritance entitled to proceeds of ornamental timber felled by tenant for life without impeachment of waste, *ib.*

Or his assignees in bankruptcy, *ib.*

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As to proceeds of ornamental timber felled by order of the court, *ib.*

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